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To AN *Margrave*
HISTORICAL ESSAY
ON THE
Legislative Power
OF
ENGLAND.

Wherein the
ORIGIN
OF

Both Houses of PARLIAMENT,
Their Antient CONSTITUTION, and the CHANGES
that have happen'd in the PERSONS that compos'd
them, with the *Occasions* thereof, are related in a
Chronological Order.

AND
Many Things concerning the *English* Government,
the Antiquities of the LAWS of *England*, and the FEUDAL
LAW, are occasionally illustrated, and explain'd.

By George St. Amand, of the Inner Temple, Esq;

*None can be said to know Things well, who do not know them in
their Beginnings. Sir W. Temple's Preface to his Hist. of England.*

*Rara temporum felicitate, ubi sentire quæ velis, & quæ sentias
dicere licet. Tacit. Hist. lib. I. cap. I.*

L O N D O N :

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M DCC XXV.

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HISTORICAL ESSAY
ON THE
LEGISLATIVE POWER
OF
ENGLAND

Which is the



Abstract of the Report of the
Committee of the House of Commons
on the Petition of the
Inhabitants of the County of
Middlesex, relative to the
Proposed Extension of the
Metropolitan Waterworks
Act, 1852, to the County of
Middlesex, and to the
Parishes of St. Martin in the
Fields, and St. Andrew, St. Dunstons,
and St. Giles in the City of London.



THE PREFACE.



It seems strange when all Persons are prepossessed with an Opinion, that History, in the most limited Sense of the Word, is a Knowledge of the greatest Importance, any should consider that Part of it which relates to the Laws and Constitution of the Government under which we live, as a Learning rather

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P R E F A C E.

ther curious than beneficial ; for, a Narrative of the little Skirmishes of our Forefathers with one another, or their Neighbours, yields neither Diversion, nor Instruction to the Reader : and however the more pompous Relations of great Battles, and the Conquests of Foreign Countries, may divert or amuse, yet they can serve for Directions or Examples to few, very few Persons ; and I fear mislead a much greater Number with false Notions of Grandeur and Honour : Whereas the other is really necessary to all who desire to know (as all ought) what is right and what is wrong in publick Affairs. The Difficulties that obstruct the obtaining this Knowledge by Reasoning only, and the Incapacity of the many to discern the Connexion betwixt self-evident Truths, and the more remote Consequences that are drawn

PREFACE.

drawn from them makes a regular Deduction of Facts (which all are capable of comprehending) the most universal Ground of Judging. This guides the less rational Part of Mankind, and gives the more thinking the Pleasure of seeing their own Schemes reduc'd into Practice, illustrated and verify'd by immemorial Usage. It may not also be amiss to observe, that this Kind of Learning must in this Kingdom answer an End more universally sought, I mean Profit at least, as well as any other, because it is really more useful. Since 'tis our Happiness to live in a free Country, where we are at Liberty to enquire into the Limits of the Magistrates Power, and the Peoples Obedience, and (all having a Share in the Legislature) few (if any) Bills of Moment have been ever propos'd, on which before

PREFACE.

they pass'd into Acts private Persons have not only by Words, but even in print offer'd their Reasons for, or against them. Now, of all the numerous Questions that yet have arisen concerning our Constitution, or that ever can arise, 'tis impossible any should be well discuss'd, much less truly determin'd without a thorough Knowledge of the antient Laws and Government. Further, will it not be always a strong, and in many Cases an unanswerable Reason for the continuing any Act of Parliament, or the enacting any new Law that may be propos'd; if it can be prov'd to be restorative of our original Constitution, which by the Mutability of human Affairs, is only in Form, and not in Substance without such Aid the same it was? On the other Side, if it should be made appear, that such Bill changes any essential, or indeed a material

Part

PREFACE.

Part of that Form of Government under which our Ancestors have liv'd and flourish'd, even in this Kingdom above a thousand Years; and which they, not without great and bloody Struggles, have transmitted to us their Posterity: Will any honest Man, I say, be for breaking that which has been found by the Experience of so many Ages (the best Test of its Goodness) so adapted and fitted to the Benefit of the whole? Nay, will any prudent Man knowingly attempt this? since it can never be the real Interest of any one, because, however the View of present Advantages to themselves may delude and mislead particular Persons, as the Majority of the People can never have any Interest but that of the publick, they will ever oppose, and consequently either prevent, or undo such Innovations. Our Historians indeed give us In-

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stances

PREFACE.

stances enough of such Iniquities prevailing; but withal suggest this comfortable Remark, that they ever prov'd little to the Actors Advantage, and but of short Duration. To our Profession this Kind of Learning is not only useful, but most necessary; for that much of the *Saxon* Law is incorporated into our Common Law we are assur'd by good Authority*; and tis confess'd by all, that many of the Acts passed after the *Norman* Invasion before *Henry* the Third's *Magna Charta* (whence our Statute Books begin) are now also in Force under that Denomination. *Magna Charta* itself, and those Acts we commonly distinguish by the Appellation of the old Statutes (the least voluminous, but the most material Part of our Statute Law) are all built on, or relate to the Usages

* *Vaughan's Reports*, p. 358.

PREFACE.

of those remote Ages. How is it then possible to understand the Reason of the largest, and most important Part of our Law, without being acquainted with the Antiquities of our Country? Now Law and Reason being the same Thing distinguish'd by different Names, as 'tis consider'd in different Views; to determine a Point of Law by Authority only without giving a Reason, seems as improper, as if one to prove the Truth of some Mathematical Proposition, should without further Argumentation cite the Authority of *Euclid*: For in my Apprehension, 'tis in the Law as in the Mathematicks; we read our Cases as we do their Propositions, not to conclude by their Authority, that 'tis thus, or thus; but to assist ourselves in reasoning well on those Subjects, and by the Observations of others collect what is Truth. Therefore the Writings

PREFACE.

things of the Learned ought to be thoroughly study'd, since no one without such Assistance can possibly attain so great a Share of Knowledge as with it: but if any should be contented with a mechanical Skill in Law by Authority only, even yet is this Learning necessary; for there are a very great Number of Cases which may occur in the course of Practice, on which without it (Authorities being dubious) no Opinion can be given. For Example, it has been question'd, whether the Bishops had a Right to vote in capital Cases, and to be try'd as the Temporal Lords, by the House of Peers? had the Nature of Baronages and Peerages been rightly stated this never would have been doubted; and I trust hereafter never will. If then the Antiquities of our Country are worth knowing, 'twill be surely confessed, that Part which relates

PREFACE.

relates to the Legislature is eminently so; the Importance therefore of the Subject seems to supersede all Apologies for an Attempt to illustrate it, nay perhaps, it makes it the Duty of all Persons to contribute what they can to so great, so good an End.

It may seem an extravagant Position to say, that the present Constitution of our Legislature is built on the same Principles, and has undergone no other Change than what the Alterations of Time has wrought in our Circumstances, made necessary to preserve its Fundamentals; as that in old *Germany* was, if not from the first planting of that Country, at least from the first Accounts we have of it, which are sixteen hundred Years old: but as to this, the Constitution may be compar'd with our Language, the present Dialect being so widely different

PREFACE.

ferent from what it was so many Ages since, 'tis scarce credible that it has receiv'd no other Changes, but what such a Length of Time necessarily works in all : And yet, whoever will, gradually ascending, read Books of every Age to the oldest of our *Saxon* Monuments, will not be sensible of the Change. So fares it as to the Constitution in general, and that of our Legislature in particular, when the Times and Causes of the several Changes that have happen'd in it, come to be ranged in due Order (which so far as it concerns the Legislature, is aim'd at in the ensuing Sheets) all appears (or I'm much deceived) easy, coherent, and natural.

Some Readers may think the two first Chapters of the ensuing Essay are not necessary to the clearing the Subjects here treated of; and this I the rather suppose, because
in

PREFACE.

in the first Design they were no Part of it; but a better Insight into the Subject convinc'd me, that they were not only useful, but essential; and I'm confident, every Reader on due Consideration of the whole will think so: For Authority and Reason both concur in convincing us, that the *Germans* carry'd their own Form of Government from *Germany* into their Conquests, and that the *Saxons* settled the like here.

As I have by Citations at the Bottom of the Page not only vouch'd Authorities where Authorities were proper, but also on other Occasions honestly acknowledg'd what I have borrow'd from printed Books; so must I here own, though I can find no Words strong enough to express my Sense of it, one of the many great Obligations of this Nature that I have to my excellent and most learned Friend Na-

thaniel

PREFACE.

thaniel Pigot, Esq; He first observ'd to me the Necessity of being acquainted with the Feudal Law, for the obtaining a perfect Knowledge of our own, and kindly permitted me to read some of his excellent MSS. on that Law: From them I have borrow'd many Things concerning the Feudal Law; which Treatises not being in print, it seem'd more proper here to acknowledge in general, than by particular References to Books the Reader cannot turn to.

These Sheets are called an Essay, because I would be understood throughout the whole to propose, and not to determine; and the Readers are desir'd so to understand what is said, even where, to avoid the nauseating them with the continual Repetition of Hypothetical Particles, 'tis not so express'd. This Deference to their Judgments, and
the

PREFACE.

the Obscurity of the Subject will, I presume, with candid Persons, not to mention others, be my Excuse for any Mistakes that may be committed; and the rather, because as the Discovery of Truth has been sincerely aim'd at, I wish they may give Occasion to some Person more capable of treating this Subject in an exacter Manner; nor shall any one be more ready than my self to give up whatever I've wrote which shall appear to be untrue; for I am as unwilling to persist in Errors, as I can be capable of falling into them.



CON-



CONTENTS.

CHAP. I. *Of the State of Europe, and particularly of the Form of Government in Old Germany; the subduing the Western Province of the Roman Empire by the Northern Nations; the Original of all the European Monarchies, Parliaments, and the Feudal Law.* Page 1.

CHAP. II. *Of the Legislature, or Parliaments of England, from the Coming in of the Saxons, to the Norman Invasion.* p. 48

CHAP. III. *Of the Parliaments after the Conquest.* p. 95



A N

Historical ESSAY, &c.

CHAP. I.

Of the State of Europe, and particularly of the Form of Government in Old Germany; the subduing the Western Province of the Roman Empire by the Northern Nations; the Original of all the European Monarchies, Parliaments, and the Feudal Law.



ALL the European Governments consisted originally of few Persons, contain'd small Districts of Land; and within the Compass of what we now think hardly sufficiently extended to compose one
B Kingdom,

All Europe was originally divided into small States.

Kingdom, we find many Princes dignify'd with the Title of King: Thus, not to mention others, we read that there were in *Italy* Kings of *Rome*, *Alba*, *He-truria*, &c. And tho' these and the like States were antiently stiled Kingdoms, yet if we were to speak of them according to the present Acceptation of the Word, and Notions of Things, we should rather call them Clans or Septs; for with respect to the Extent of Ground, the Number of Subjects, and the Power of the Superiors, they resemble more the Highland Lords in the North Part of this Isle, or the old Tains in *Ireland*, than the present Lustre or Power of Kings.

Most of
them were
reduced
under the
Roman
Govern-
ment.

The *Romans* ('twas a natural Consequence of the Circumstances of those Times) whilst they were a free State, extended their Command over great part of *Africa*, and *Asia*, and all *Europe*; (*Britain*, *Germany*, and the more Northern Provinces only excepted.) As their Empire encreas'd, so did their Vices, and the Corruption of the People, which gave *Cæsar*^a, whose Youth had been spent in the most scandalous and abandon'd manner, a favourable Opportunity to effect what *Catiline* had aim'd at before, I

^a Vid. Suetonium in vita Cæsaris.

mean the reducing that Empire under his own Power. As *Catiline's* failing left his Attempt branded with the odious Name of a Conspiracy, which his Adversaries most justly impos'd on it; so *Cæsar's* Success made Posterity call his Rebellion by the specious, but improper Name he himself gives it in his *Commentaries*, of a Civil War. That he established Tyranny, and that it continued long after in the *Roman* Empire, is too well known to be farther insisted on.

Whilst all the rest of *Europe* (for *Britain*, after the Change of the *Roman* Government, was subdu'd) groan'd under the galling Yoke of Tyranny and Oppression, *Germany* (under this Appellation *Tacitus*, *Paulus Warnefridus*, and others, comprehend the Northern Nations^b, for they come from one common Stock^c) preserved its native Liberty, and probably the self-same Government that was established when those Countries were first planted; and then, as now, 'twas divided into many States, all independent one of another^d; few, very few only, were under Kings, and but two of those were absolute Monarchs^e. In the

*That into
a Monar-
chy by
Cæsar.*

*The Ger-
mans pre-
served
their Li-
berty.*

*The Con-
stitution of
the Ger-
man Go-
vern-
ments*

^b Craig, de Feudis 19. Verstegan 156.

^c Grotii proleg. ad Histor. Gothorum, 22.

^d Cæsar de Bell. Gal. lib. 6. c. 21.

^e Tacit. Ger. c. 43, 44, & 7.

other Provinces there were Superiors, distinguish'd in the *Latin* Authors, from whom we have the Account of their original Government, by the Name of Princes, in *Latin*, *Principes*^f; which Word denotes no more than the First, nor, as to the *Roman* Affairs, during the Commonwealth, is it to be found in any other Acceptation. Thus *Princeps Senatûs* does not denote the Ruler or Tyrant of the Senate, but only the Person who had the first Rank in it. Under the Emperors, even so low as *Trajan*, (and lower we need not look, for 'tis only necessary to know what Sense *Tacitus* uses the Word in) we find the Word *Princeps* used by his intimate Friend *Pliny*, in his Panegyrick on *Trajan*, in a like Sense: *Hic regnum ipsum, quæque alia captivitas gignit, arcet ac submovet, sedemque obtinet principis, ne sit domino locus*^g. And in the same Panegyrick, in another Place, he has this Expression, *Scis ut sunt diversa natura dominatio & principatus, ita non aliis esse principem gratiores, quam qui maxime Dominum graventur*^h.

The Princes amongst our *German* Ancestors obtain'd their Dignity by Ele-

^f Tacit. Ger. & Cæsar, ubi supra.

^g Pag. 328.

^h Pag. 319.

tionⁱ, and their Authority consisted rather in persuading than commanding; in Affairs of little Consequence the Princes determined; in those of great, the whole Nation; who for the exercise of this Power, and to consult of their own common Good, met at stated times arm'd. At these Meetings were all great Affairs settled, Princes chosen^k, and those who had been guilty of Crimes might be accused^l: Here also were the Youth, when grown to Mans Estate, produced, and by giving them Arms, advanced into the Rank of military Persons^m.

The Territories of each Nation were divided into several Cantonsⁿ, which were afterwards call'd Counties^o, where the Princes administred Justice, and composed Controversies, but not solely or by their own Authority, for 100 of the common sort were associated to them, to give them both Advice and Authority^p. The Princes also annually assigned Lands to the People, according to their Tribes and Families, to be by the Indi-

ⁱ Tacit. Ger. c. 12.

^k Tacit. Ger. c. 11.

^l Idem c. 12.

^m Idem c. 13.

ⁿ Tacit. Ger. passim.

^o Grotius de Antiq. R. P. Batavorum 62.

^p Tacit. Ger. c. 12. Cæsar ubi supra.

viduals possess'd for one Year and no longer^a. These were afterwards by them portion'd out to their Slaves, to plough and till, under a Reservation of part of the produce of the Land; for in *Germany* each Person's Wife and Children did the domestick Business of the Family^r.

In time of Peace the *German* Nations had no common Superior of the several Cantons each Nation was divided into, but on any War one was chosen, with power of Life and Death, to command the Army^s; in which the Individuals were ranked and placed in Troops, not by Accident or Chance, but according to their Families and Kindreds^t. On the whole, what the most learned the late Bishop of *Peterborough* says of all Governments in their primitive Institution, is strictly true of those in *Germany*: His Words are these, " And we
" find no other Obligation laid on them
" that were under the same Govern-
" ment, but that they were to be
" (σύμμαχοι) Assistants to each other in
" case of an Invasion from without, or

^a Cæf. de B. Gal. lib. 6. c. 20. & lib. 4. c. 2.

^r Tacit. Ger. c. 25.

^s Cæfar. de B. Gal. lib. 6. c. 21.

^t Tacit. Ger. c. 7.

“ a Rebellion arising within the same
“ Kingdom ^v.

Tho' the *Romans* branded our Ger- The old
Germans
not so bar-
barous as
has been
imagined.
man Ancestors with the Name of Bar-
barians, yet if we look closely into
things, we shall find the Northern Na-
tions had more reason to retort that op-
probrious term: The Learned *Grotius*
has very exactly drawn their Compari-
son^w. In this Place it may be sufficient to
remark, that tho' the *Romans* certainly
exceeded them in all the Elegancies and
Luxuries of Life, and also in the Politeness
of Manners; yet in Benevolence to
Mankind, the great Virtue of human
Nature, this People excell'd the *Romans*.
We are expressly told the *Spaniards*
found it more eligible to live in Sub-
jection to these Northern Invaders, than
to the *Romans*^x, and 'tis highly proba-
ble others did so: And well they might;
for as is already observed, the greatest
Rigour they used to Slaves, was only
reducing them to the state Farmers are
in at this time. Nay, one of the finest
Genius's that ever *Rome* bred, mentions
the difference of their Circumstances, as
if he thought them the happier of the
two.

^v Orig. Gentium Antiq. p. 261.

^w In proleg. ad Hist. Gotho. p. 32, &c.

^x Mariana lib. 5. c. 1.

*Libertas ultra Tanain Rhenumque
recessit,
Et toties nobis jugulo quæ sita negatur,
Germanum Scythicumque bonum.*

*The differ-
ent effects
of Liberty
and Sla-
very.*

Germany and *Rome* continuing, the one in a State of Liberty, the other of Slavery, yield the most illustrious and evident Proof of the Consequences that attend those Conditions. That great City, which from small beginnings in a free State, extended its Empire so widely, that as *Livy* expresses himself, it *labour'd under its own Greatness*: That City, whose Inhabitants, whilst 'twas free, notwithstanding its continual Wars, multiplied so fast, that it sent Colonies into the remotest Part of its far extended Command; when reduced to Slavery, soon became depopulated, as did its Provinces: Tho' many means were tryed to allure and compel the Inhabitants to marry, yet they all proved ineffectual; and well they might, for who would exert his Industry in acquiring a Property that was unsecure, or get Children who could be certain of no other Inheritance but Slavery, and were sure of that? The Strength of the Empire was not only decay'd in Numbers, but more in Spirit ;

y *Lucan lib. 7. lin. 243.*

for

for Slavery debases the Minds of Men :
And it fares with Nations as with private
Persons ; both by Oppression grow
stupid and decline, even as low as the
brutal part of the Creation, unless they
have Spirit enough to relieve them-
selves : And then the Causes of their
Woe, as in Justice they ought, and ever
will, meet with an ample Retribution.

The Liberty in *Germany* produced
the same Effects that it had done in
Rome, they multiplied, and being hem'd
in by Nations as free as themselves,
the Sea, or the *Roman* Territories, and
thereby having no Opportunity of
sending Colonies in a peaceful Way,
were forced to do it in a military one.
For Mankind, like Waters, if pent up
in too narrow a Compass naturally break
their Bounds, and overflow the adjacent
Country.

This Increase of Numbers amongst the
Northern Nations, tho' it necessitated
them to disgorge themselves, yet as
none had a permanent Interest in Land,
there seems to have been no Foundation
in Justice or Reason, to determine who
were to leave their native Country, and
embark in the laborious and perilous At-
tempts of conquering new Habitations.
'Tis therefore highly probable, they all
proceeded in appointing the Persons that
were

*The In-
crease of
People in
Germany
necessitated
the sending
out Colo-
nies.*

*How they
proceeded
in doing it,*

were to undertake these Expeditions, in the same or like manner that the *Lombards* (a People of *German* Origin) did; they by Lot decided who should go a Colonizing in a hostile Manner². That these Armies were form'd in the Manner we have already describ'd to be usual in *Germany*, is a truth too obvious to need any Proof.

The General had a double Superiority.

In the General a twofold Superiority may be usefully remark'd; first that he was Superior of the whole collective Body; secondly that as the whole was a confederate Force of different States, or at least of different Cantons, and the Detachments of each led by Superiors of their own, so was he, as well as others, Superior over his own particular Followers; and that all the Power that the General or any other was invested with, flowed only from the Good-will of the Individuals, and was conferr'd by Election, is evident to any one who will duly consider what we have already said of the Form of their Civil Government.

The Settlement of the Northern Nations in the West of Europe.

Many were the Irruptions of the Northern Nations; and as the Imperial Seat was removed to *Constantinople*, the wretched Princes, that ruled this decaying Empire, took most care to secure the

² Paulus Warnefridus de Gestis Longobardorum, c. 2.

Parts near the Place where they resided, and consequently left the Western Provinces more exposed. And as the Inhabitants were thinn'd, and those that were left were debased in Spirit, these Invaders, tho' ill armed and worse disciplined, with less difficulty conquered all the West of *Europe*, than the *Romans* did one Province from the Natives when they were free. And at last the *Franks* and *Normans* settled in *France*; the *Longobards*, and afterwards the *Normans* in *Italy*; the *Alans*, *Vandals*, *Suevians* and *Silingians* first, and finally the *Goths* in *Spain*^a, and the *Saxons* in *England*. All which Revolutions, however amazing they may seem to short sighted People, yet to those of any Penetration will appear nothing more than the natural, and as I think necessary, Consequence of the Liberty the Conquerors, and Slavery the Conquer'd lived under.

To understand the manner how these victorious People settled themselves, in their respective Conquests, which will at once disclose the Origin of all the *European* Governments, and the feudal Law; I must premise this Observation, viz. that by the Conquest of the Land, the Property of the whole was vested in the collective Body of the People, and

^a Isidori Chronic. 733. Mariana, lib. 5. c. 5.

The Property of the conquer'd Land was in the collective Body of the Victors.

The Proofs of this Proposition.

not in any one Person. And for the better establishing this Truth, I will prove, that the Right was lodged in them; and also that that Right was by them enjoyed, pursued, and executed.

In order to shew how the Right stood, 'tis to be observed that these Adventurers were not Hirelings, had no Pay as our Armies have, which consequently are in the Nature of hired Servants, and whatever they get *they get* for the Benefit of their Pay-Masters; but theirs consisted of a voluntary Society, and were, if I may use the Expression, Partners in the Expedition^b: For tho' the General, and other Chiefs were trusted with the conducting them, in such manner as would best answer the Ends they proposed; yet surely none can suppose they left their Country where they were free, and ventur'd their Lives without any Pay, for no other End than the acquiring a Property in the Land for their Leaders, and nothing for themselves, no not a Habitation, without losing that Liberty, the *German* Nations always prided themselves so much in^c. Secondly, in fact the Land was parted amongst the Individuals, and we read expressly,

^b Craig de Feudis 20. Mezaray in the Lives of Clo-thaire II. and Philip Aug.

^c Vide Tacit. An. lib. 11. C. 16, &c.

that

that *Rollo*, our *William* the 1st. Ancestor, honestly divided *Normandy* by Measure amongst the People he led^d. And this Notion of every Individual's having a Right to a Share in all that was got by War, continued long amongst the *French*; of which I will mention one very memorable Instance, and that too even when they were under the Government of Princes dignified by the Writers of those Ages, and by us since, with the Title of Kings; 'tis this: Amongst the Plunder a Piece of Church-Plate was taken; this the King had a Mind to restore entire to the Church it belong'd to, but one of the Soldiers insisted on his Right to a Share of the Plate, and with his Sword divided it, and took Part. Their King a Year after, took occasion to quarrel with and destroy that Soldier; but his not doing it then, evidently shews, he did not want Will, but Power to punish the Action, and that what the Soldier did, was by the Usages of that Nation, consonant and agreeable to Right and Law^e.

The Property of the conquer'd Land being then in the whole collective Body of the Conquerors, every Individual might be said in our Law-Phrase to be seized

The Necessity of parting the conquer'd Land.

^d Vide *Basnage* on the first Chapter of the Customs of Normandy, &c.

^e *Mezaray*, p. 3.

per my & per tout, and to have a Right to some, tho' an undertermined Part: And as the Irruptions from the North did not proceed from any Lust of Rule, but from Necessity; so the planting, and not plundering the Country, was the end proposed: Therefore the ascertaining this unfixed Interest was necessary to their intended Settlement.

*How't was
done.*

As the conquering Army was composed of a rude and unpolish'd People of several Nations, or at least of Detachments out of several Cantons in the same, so was it the most obvious and natural Method, to proceed in the Distribution of the conquer'd Land, by assigning to each distinct People a certain District of Land as their Portion, who having lived together in their native Country, and after their leaving it associated under the immediate Conduct of one and the same Person, were planted together; that to use *Tacitus's* Expression, *mutua caritate Rempublicam efficerent*. These Apportionments founded separate and distinct Governments in their first Institution, resembling in all Respects the Cantons in old *Germany*,

*Whence the
Division of
Kingdoms
proceeded.*

and not unlike the Princes of the *Empire*, and are the Foundations of most of the Divisions of the Western Provinces of *Europe*, whether they are distinguished

guished by the Names of Principalities, Dukedoms, Counties, or any other Denomination : And many Remains of the antient Sovereignty of the little States still subsist, tho' they are in all Places, except *Italy* and *Germany*, destroy'd. The Administration of Justice, the great Characteristick of Sovereignty in those Days^f, is yet, according to these old Divisions, several and distinct. Hence 'tis that in *France* every County and Duchy (I speak of the old ones) had, and yet have, a Parliament ; in *Spain* all their numerous Kingdoms have theirs, which they call *Cortes* ; and in *England*, not to mention the Royalties of the *Palatinates*, every County has a distinct County Court : All which, however they differ now in Name and Power, were, in their first Institution, one and the same. And since the Decline of the County-Court, the Judges have separate Commissions for the Powers they execute in the several Counties. Nor is the military Power less separated, being in other Countries lodg'd in Governours of the several Provinces ; and in ours in Lords Lieutenants, whose Commissions for every County are also several.

^f Grotius de. A. Rep. Bat. 61.

From ascertaining the Property of every People the Confederate Army was compos'd of, the next Step was the Distribution of these Divisions. We have seen how in *Germany* Allotments were made of several Portions of Lands to the Individuals, according to their Families and Kindreds, to be possessed for the Space of a Year, and how they were afterwards portion'd out : These Conquerors proceeded therein according to the Usages of their own native Country. That they did it at a general Meeting, we may reasonably believe. And it seems clear, that it was done also by Families and Kindreds, not only from what we have already observ'd, but also because we find amongst the *Lombards*, after they invaded *Italy*, one of their Chiefs insisted on having some particular Lineages and Families for the Inhabitants of his new Dukedom §.

The Estate of the first Proprietors only annual.

The Interest in the Lands so assign'd was but annual, and the Use or Perception of the Profits was only given to the Occupiers, the Property remaining in the Donors. Hence arose the Distinction of *Dominium directum*, and *Dominium utile*, the Characteristick of Feuds.

§ Paulus Wernefridus de Gestis Longo. 781.

These

These Allotments to particular Persons are call'd by the Authors who write in *Latin*, whilst they remain'd annual, or only for Term of Life, *Beneficia*; a Name they were first distinguish'd by in the Reign of *Clovis* ^a. This Word yet is used, tho' applied only to Church Preferments. Afterwards, as 'tis thought, first in the Constitution of *Charles the Gross*, in the Year 884. Feuds^b, in our Language, for ought appears, originally as now, Fees. Even in the same Sense the Word is at this Day used in common Parlance.

*The Use of
the Word
Benefici-
um and
Feudum.*

There is a vast Variety of Opinions amongst the Glossarists concerning the Derivation of the Word *Feud*, which the Reader may see in the Books referr'd to in the Margin ^c. The most rational Account that I have found of its Etymology, is that which deduces it from two old *Teutonic* Words, *Fee* and *Ot*, or *Odd*; for *d* and *t* are frequently interchang'd in the *German* Tongue; the first of which originally had the Signification it now has in common Use, the latter Word signified Possessions: So that verbally translated it means no more

*The Deri-
vation of
the Word
Feud.*

^a Dominici de Alodiis, c. 8.

^b Craig's *Sov. of Scotland*, 17. Dominici c. 15.

^c Somner of Gavelkind.

than a Gift of Possessions^d. Nor can the writing of it at present *Feudum* be an Objection to this Etymology, for in the old Authors 'tis commonly wrote *Feodum*; and we in our Language still write *Feofment* and *Feoffee*, tho' the *o* is hardly founded in the Pronunciation.

When Services of the Tenants reserved.

Whether on the Distribution of the Land any Service was expressly reserv'd, is not determin'd by any Author of Note; but it seems highly probable that no Service was reserv'd, because the Allotments being given to the Possessor as a Member of a voluntary Society, to be held but for a Year at most, such Reservation seems unnecessary; for why should the Donors stipulate for a Power to remove a Possessor, whom they otherwise had a Right to deprive of his Fee within the Space of a Year, and at any Time by expelling him the Society, or as we now call it, outlawing the Party.

What Form of Government the German Nations established in their Conquests.

As these victorious People were *Germans*, and parted their Lands according to the Methods practis'd in *Germany*, 'twill be natural to suppose that they established a Government conformable to that they had in their native Country

^d Grotii Proleg. ad Histor. Goth. p. 20. Shilter de Succes. Feud. Somner of Gavelkind, 109. & in Glossario. Vide etiam Spelm. & Dufresne in Glossariis.

been us'd to. And in Fact so they did; for their several Leaders presided amongst their Followers, in the Administration of Justice, in the same manner that the Princes did in *Germany*. And as these were temporary Officers^e, tho' distinguished by various and different Names, the right understanding which will much contribute to the clearing what we shall further say on the Subject of this Essay, therefore the Explication of them must be here attempted. These Names may be aptly divided into two kinds; first, those which are used in the several Languages of the Conquerors; secondly, those they are denoted by in the *Latin* Authors.

Their Magistrates had various Denominations.

The Rank of Men whom *Tacitus* styles Princes, by a Word common enough in the *German* Laws, are call'd *Graves*, which signifies no more than Judges^f. Of the same Import is the old *Saxon* Word *Gerefa*; nor is it unlikely that originally they were of the same Sound; for whoever will but consider, that Writing, the great Preserver of Orthography, was unknown to the *Saxons* at their coming here, how various, even at this time, the same Words

The Meaning of the Word Gerefa, and its Derivation.

^e Mariana, lib. 6. c. 1. Mezeray, &c.

^f Grotius de A. Rep. Batav. 62. Vide Legem Salic. Edit. per Eccard, p. 68, &c.

in different Places, are pronounc'd, will readily conceive that some variety of Spelling must necessarily occur. Besides, I would submit it to the Learned in the *Saxon*, whether the *e* in the Syllable *Ge* does not, like the *Hebrew Sheva*, only soften the Sound of the Letter *G*, which otherwise was in the old *Teutonic* founded like *K^g*, and of it self constitute no Syllable. However the *e* came to be lost, sure 'tis that this Word was here wrote without it; for in the Laws which go under the Name of *Edward the Confessor's*, we find the Word *Gréve*, as the *French* have their *Greffier*, a Word derived from the same Root, and originally of the same Signification^h. It should seem also that our Ancestors indifferently wrote this Word *Greve* or *Grave*, since we find it wrote in this last manner in the Word *Portgrave*ⁱ, and also in several Surnames. As the *e* was lost in the latter Part of the *Saxons* Time, so in the *Norman* the Spelling was yet reduced to a nearer Conformity to the Sound, and the *G* is left out of the Beginning; whence came the well known Word *Reve*.

^g Grotii Prolegomena ad Hist. Goth. 20.

^h Spelm. in voce *Gravio*.

ⁱ 4 Instit. 253. Verstegan. 290, 326.

As the Word signify'd a Judge, and the Kingdom in proceſs of time was ſubdivided into ſmaller Diſtricts, *viz.* Trythings, Hundreds or Wapentakes, Tythings, or Town, every one of theſe Diſtricts had Judges. Hence came the old Words *Led-Grave*, *Cent-Grave*, *Tun-Grave*, and others^k. So in *Germany* the Judges of the Diviſions uſed in that Country were denoted by the ſame Word conjoin'd with the Name of the Diſtrict: For example, the Judges of the *Boro'* and *Marches* were called *Bur-Graves*, and *March*, or, as now commonly wrote, *Mark-Graves*^l; and in theſe two laſt, even it yet ſignifies the ſovereign Princes of the Territories 'tis applied to.

As this Rank of Men were called *Graves* from their Office, and as amongſt an illiterate People Wiſdom can only be got by Experience; ſo were they, as it ſeems, commonly, tho' not always, old Men; and from their Age received another Appellation here in *England*, being in the firſt Ages of the *Saxon* Government call'd *Ealdermen*, which, literally tranſlated, ſignifies *Eldermen*^m. In *France*, *Italy*, and *Spain*, where the *Latin* Tongue was more eſta-

*The Senſe
of the
Word Eal-
derman.*

^k Spelm. Gloſſarium in his vocibus.

^l Selden's *Titles of Honour*, 348. Vid. Camden, 227.

^m Forteſcue on Forteſcue of *Monarchy*, 62.

blished, and rather corrupted than extinguished, they were denominated by Terms derived from the *Latin Senior*; and we since the Conquest use the Expressions Seignior and Lordship as synonymous Terms. The other Appellations, of Prince, Senior, Count, and Duke, being *Latin Words*, wrote and founded according to the Dialects and Pronunciation of the Nations that utter them, will be best understood by explaining the *Latin* ones.

The Mean-
ing of the
Word
Princeps.

The classical Sense of the Word *Princeps* having been stated, its Signification in the middle aged Writers need be only here considered. Two Authors of unquestionable Authority, have been pleased to inform us, that this Word, when applied to the *Saxon Times*, signifies *Ealderman*ⁿ. Subsequent to the Conquest, the same Notation of the Word continued; for *William* the Conqueror is indifferently styled Duke, Earl, and Prince^o. But this Word in the *Norman Time* had yet a more general Signification; for Example, *Eadmerus* uses it in one Place as co-significant with the *Latin Words*, *Primoribus & probis ho-*

ⁿ Selden's *Titles of Honour*, 502. Judge Fortescue's *Notes on Fortescue of Monarchy*, p. 64. Vid. Marculphi *Monachi Formul.* 8. & Bignon. not: ad illam.

^o Fortescue ubi supra.

minibus

minibus Cantia^p; and in another enumerates the Persons comprized under it thus, *Episcopi, Abbates, & quique Nobiles*^q. But what clears the Sense of the Word beyond all doubt, is the Use this Author makes of it, when he relates that *Hen. I.* summoned the Bishops, Abbots, and Princes of the Kingdom, to do Homage to his Son *William*^r; for by the Rules of the Feudal Law, as then understood, Homage was due from all the immediate Tenants of the Crown, and them only; therefore 'tis plain this Word must comprise all those Tenants, and no other.

One of the oldest, and indeed the most proper Expressions that I find applied to the Chiefs of these victorious People, more commonly after called *Comites*, is the Word *Senior*^s, which is no more than a mere Translation of the *Saxon* Word *Elderman*; whence one would incline to think that Expression, or an equivalent Term, was used in other Countries as well as ours. This Word is explain'd by Sir *T. Craig* thus, *Senior*, i.e. *Dominus Ealderman, Baro Caput Tribuum*^t.

The Meaning of the Word Senior.

^p Pag. 9.

^q Pag. 16.

^r Pag. 117.

^s Dominici de Alod. c. 8, 13, 14, 15, &c.

^t De Feudis, 36.

*Exposition
of the
Word Comes.*

The Word *Comes*, literally translated, is no more than Companion, and was no Name of Office or Dignity till *Constantine* first gave it to all Persons who had any Office ^v. How the Rank of People call'd by *Tacitus Principes*, and by the Northern Nations *Graves* (for that *Grave* is the *Teutonick* Word for the same Person the middle-aged Writers express by the Word *Comes*, is most sure ^x) came to be denoted by this Appellation, is not to be accounted for, unless 'twas because they were all equal to one another in Rank and Dignity ^y.

*Dux, its
Significa-
tion.*

The Application of the Word *Dux* is indeed obvious; it implies no more than a Leader, and is a Term applied to the same Person as the Word *Comes*, the one as it seems to denote a civil, the other his military Capacity ^z. Nor will the Union of these several Duties in one Person seem strange to those who consider, that neither the Science of Law, or the Art of War, were, in the times of our *Saxon* Ancestors wrought up to that Degree of Nicety we now

^v Mezaray, p. 3. Selden, &c.

^x Paulus Wernefrid. 886. Eccard ad Legem Salicam, 133. Kilianus voce Grave, &c.

^y Grotius de A. Rep. Batav.

^z Marculphi Formulæ, Form. 8. & Bignon. Notæ ad illam formulæ, edit. per Linden, 6. n. 32. Fortescue in Fortescue of Monarchy, ubi supra.

see them arrived at. Nor was the Union of these Offices in one Person without Example, for so it was originally in *Rome* in the Consul; and how qualified he was for either, we may comprehend by *Ovid's* Description of him.

*Jura dabat populo posito modò consul
aratro.*

The Followers of these Chiefs, distinguished in the *Latin* Authors under the Appellation of *Comites*, remain'd in the same State they were in their native Country, and after became known in the Writers of the Feudal Law by the Name of *Vassals*; a Word that is derived from the Word *Gesell*, which was the Name they had in *Germany*^a. They had also, as these, a Share in the Legislature and Government of their new Conquests.

*The Sense
of Comi-
tes and
Vassals,
with its
Etymolgy.*

These victorious People did not dispossess the Inhabitants in their Conquests of all their Lands, nor yet did they incorporate them into their People, or suffer them to constitute a part of their Government; for in *Italy* the *Goths* divided the Lands into three parts, one they left to the old Possessors, the other two they took to themselves. These

*The Con-
querors
left some
Land to
the old In-
habitants.*

^a Grotii Hist. Goth. 593. Spelm. in hac voce.

Divisions are in the Writers of those Ages called *Sortes Gothicae* and *Sortes Romanae* ^b. 'Tis highly probable from the Passage we cited above out of *Mariana*, that they did the like in *Spain*.

How they
were deno-
minated.

Sure it is, that the *Franks*, when they established themselves in *Gaul*, proceeded in the same manner; but their Divisions had different Names, for what they took to themselves was termed *Terra*

Terra Sa-
lica, and
Alodium.

Salica, the other, in the *Latin* Authors of these Times *Alodium* ^c, which Word was then first used, and is derived from

The Ety-
mology of
Alodium

A and *Leud*; for in the old *Teutonic* Language *A* is a privative or negative Particle: Also *Leud* in the same Language signifies Persons link'd together in Feudal Tenures ^d, who were the Persons that had a Share in the Government. So that however the Largeness of the Estate in After-ages made it valued, for they remain'd, as originally under the *Roman* Government, hereditary, and not subject to any of the Feudal Duties; yet before Tenants were oppressed, as it happened in subsequent Times, with the undue and illegal Executions of Institutions devised for their Good, the

^b Dominici de Alod. c. 5. f. 8.

^c Idem c. 7. sect. 4.

^d Idem c. 8. sect. 8. Cambd. Brit. 170. Spelm. in voce Alod. Et vide Eccard. ad Leg. Salic. p. 166.

Term

Term *Alodarii*, by which the Possessors of *Alodium* were denoted, was a term of Reproach, as it discriminated the Vanquish'd from the Victors, and those who had no Share in the Government, from them that had. Tho' in this first use of the Word, their Land might be properly said to be free of all Service, afterwards for the secure Enjoyment of these portions of Land, many of the Possessors gave their *allodial* Lands to the Chiefs of great Lordships, to take them back under feudal Tenures. Others without divesting themselves at all of their antient Possessions, placed themselves under such Superiors, and then came in Use the Phrase of *tenere in Alodio*, frequent enough in our Book of Doomsday^e; and foreign Writers; for all Protection and Subjection was supposed then to be founded on Tenure.

Many these Conquerors found in a ^{Slaves not} state of Slavery, and others 'tis probable ^{Members} they reduced to it; these were not by ^{of these} them consider'd as Members of the Republick, but as part of their Owner's Substance; and doubtless were treated in the same manner those in that Condition were in *Germany*.

Seld. Spiceleg. ad Eadmerum. Brady in his Preface to his History, passim.

The

The Difference be-
twixt the Govern-
ments in
Old Ger-
many.

Of the O-
rigin of
Kings.

The only Difference I can discover between the *European* Governments as instituted by these victorious People, and the old one they lived under in *Germany*, is with Relation to their General, who was there an Officer like the *Roman* Dictator, made on extraordinary Emergencies, and no standing Magistrate in the State. In him we find a Difference consequential to the Difference that was in their Circumstance; for being in a Country but newly subdu'd, and to which they had no Title but the Sword, they were always in a state of War, and therefore they continued him in his Office. These Leaders or their Successors were in time styled Kings by their own Followers: I say in time, because neither in *France*, *Spain* or *Italy*, have they any Word that signifies King, but what is derived from the *Latin*, a Language these Invaders were Strangers to when they settled themselves in their Conquests, and only gradually, and in the Revolution of many Years, by being corrupted with their native Idiom, became the Dialect of these several Kingdoms. In *England*, where the *Roman* Language was rather introduced than establish'd, our Word is derived from the *Saxon*, and from the Glossarists of that Language, its Signification may be sought,

fought ^f, but even that Word, such as it is, was not in its primitive Signification for some time applied to the Leaders of our *Saxon* Ancestors, for they were only styled *Heretoge*, from ^g the old *Teutonick* Words, *Here* which signifies Publick, and *Toge* that signifies General ^h, as if we should now say the General of the Publick; and indeed that seems to have been the Notion these *German* Nations had of a King, for we find the Writers of those Ages dignifying the Leaders of these invading Nations, even before their Conquests with this Title, tho' at the same time their Dominions extended no farther than their Camps ⁱ. And the *Longobards* retained so much of their old way of thinking, that after they had lived in Peace some time in that part of *Italy*, since from them denominated *Lombardy*, they laid aside the Kingship, and lived under the Administration of thirty Dukes. Yet on the Approach of War they created a General, whom the Writers of those Ages according to Custom call King, leaving however the

^f Verstegan 315. Cambd. Brit. 234. Somner, &c.

^g Tyrrel's *Introduct.* to the first Vol. of his *Hist.* 40.

^h Kilianus in voce *Here*.

ⁱ Vertot of the *Establishment of the Britons in France*. Vol. I. 168.

Power of the Dukes entire ^k, nor even after the assuming of the Title of King, did the Chiefs so styled, use any Ornaments of Royalty till long after. In *Spain* none were till about the Year 609^l. In *France*, *Charlemain* first introduced them, who having usurped the Title of Emperor in the West, thought it necessary the better to equal those of the East, to emulate them in the exterior Appearances of Majesty ^m.

*The Origin
of Parlia-
ments, Dy-
ets, &c.*

As the General in the Army derived his Power from Election, and consulted with the other united Leaders in carrying on their Design, so after their Conquest and Settlement, and the Accession of the Regal Title, there were Meetings, as in *Germany*, to consult of the common Good of the whole; they are distinguished by various Names here, and in *France* they were called Parliaments, in *Germany* and *Poland* Dyets, because they set but one Dayⁿ, in *Spain* Cortes, in *Latin* *Placitum*, *Curia*, *Malleum*, but most commonly *Colloquium*, which deserves to be remark'd because the Treaty of two absolutely Independent Sovereigns, for example, the Kings of *France*

^k Mezaray ad Annum 583, Paulus Warnefrid.

^l Mariana lib. 5. c. 9.

^m Selden's *Titles of Honour*, 311.

ⁿ Dufresne voce *Dyeta*.

and *England*, are constantly expressed in the middle aged Writers by that particular Word °.

From this plain Distribution of the conquer'd Land, time wrought two considerable Changes, which both seem however to have been the natural Consequences of the Alterations it produced in the Circumstances of the Conquerors; I mean, in the Interest of the Feoffees, and the annexing Services, since known by the Name of Tenures, both which shall be briefly touch'd.

Two Changes wrought in the European Government.

Time and Peace produced such an Increase of People, that the conquer'd Land became narrow enough for the Inhabitants, and withall had given these new Planters some taste of the Pleasures, perhaps Elegancies of Life. Hence it became the Interest of the then Possessors to make their Estates more durable, and the Superiors also found the sweet of Power, which naturally induced a desire in them to secure the Possession thereof. Hence these Rights that were originally annual, were enlarged into Estates for Life, after of Inheritance; for what was the Interest of all, who had Power to do it, could not be difficult to effect. Further Particulars of this Change the Reader may find in the Books re-

Feuds made Hereditary.

° Brady's *Hist.* passim.

ferr'd to in the Margin^p, 'tis fufficient for our Purpose to obferve 'twas done, and that this Alteration naturally induced two others very confiderable in the Conftitutions of thefe Governments: For,

*The Origin
of Hereditary
Superiorities of
Trades and
Serving.*

First, It gave Rife to the Hereditary Kingfhips and Nobility throughout *Europe*.

Secondly, The Land being all appropriated, Neceffity obliged many Perfons to devife Ways and Means from miniftring to the Occafions, Eafe, Pleafure, and Luxury of the Rich, to obtain by fuch Services a Maintenance from the Profit arifing thereby to themfelves. Hence arofe the Invention of fome, and the Encouragement of all Sciences, Arts and Trades: This laid the Foundation of the many Cities or Burroughs that were form'd throughout *Europe*, which formerly in other Kingdoms as well as our own, by being in the Conftitution neceffary and ufeful, became confiderable.

*The freeing
Services
for Land.*

As to Tenures, the fecond Alteration noted to have been wrought, it is to be obferved, that the Services originally

^p Lib. Feud. lib. 1. c. 1. Craig. de feud. Tit. 4. f. 4 &c. Alteserra de origine Feudorum c. 9. Dominici de Alodiis c. 14. & 15. Duck de. J. C. c. 6. Spelm. Remains p. 4. & in voce *Feud.* Vertot of the *Eftablifhment of the Britons*, Vol 2. 58. Conftit. Siculae, lib. 3. Tit. 24. f. 2. Shilter de Succellione feud. p. 4. Mabillon de Re diplomatica 220. & 264, &c. Mezeray ad An. 670. & 992, &c.

annex'd to Estates, or by which they were supposed to be holden, were few, and such only as Reason dictated, tho' after Ages multiplied them, and introduced many that were absurd enough. But to illustrate what's here advanced let us consider, what Services it was reasonable Landholders should perform in the Circumstances they were in.

Feuds or Fees were in their Institution, and after, by the feudal Writers, look'd on as Gifts (the Land being of more Value than the Service) and by that Name are denoted in the Books of Feudal Writers, as well as our own Law Books; therefore the Dictates of the least improved Reason taught that the Superiors, whose Share no doubt was the largest and the fairest, should still continue to discharge the Trust for the well executing of which they were so amply rewarded: That whatever was necessary for the Preservation of the whole Community, of which each Landholder was a Member, and by whose Gift they held their Estates, each should do for the good of the whole, and that the Tenants lay under such Obligations, as the Rules of Gratitude tell the Donee he has to the Donor. Thus as the Leaders of every independent People before the Apportionment of the Land, led their Follow-
D
ers,

*Services of
Tenants.*

ers; and in publick Councils as their Head or Representative took care of their Interest, so it was necessary after the Settlement in their Conquests, they should do the like. Further each Individual having his Share likewise, tho' not immediately, by the Gift of the whole, and being one of, or descended from one of the conquering Army, he was to perform military Service, when occasion required; that is, when there was any Rebellion at home, or the Property of any one of the Community was by a foreign Enemy invaded. For as every body's Interest was consider'd on the Distribution of the Land, so was it but just that each should defend the other in his Share.

*Services of
the Superi-
ors.*

The large Portions since distinguished by the Names of Counties, &c. being allotted to one of the Superiors and his People, as Members of the Confederate Army that conquered the whole Land, and the Share of each Individual being given to him as a Member of one of the Confederate Nations or Cantons, it follow'd plainly that each Nation ought to be faithful to the Confederacy, and each Individual to his own Nation. Thus arose those several Services which were after known by other Names, *viz.* that of the Superiors or Leaders by the Name
of

of Baron Services, &c. those of the Individuals by that of military Tenures, and the Obligations of all by the Word Fealty; but whether these Tenures were by express Words annexed to the Estates on the Donees gaining Estates for Life, or Inheritance in them: or whether from the constant Ejectment of Tenants who refused to conform to Rules so obviously just, later Ages considered these Services as tacitly, before they were expressly annex'd to the Estates; it is not easy to decide, nor is it necessary for the present Design: Only it may be observed, that the obliging the Individuals to Fealty by Oath, was introduced at, or soon after the time Feuds were made Hereditary^p, for as it seems, it was very common, if not universal in the Year 1020; since I find at that time the Extent of this Oath enquired into and explain'd as a thing of general Concern^q.

After the Tenants obtain'd a permanent Interest in their Feuds, many Differences arose betwixt the Superiors and Vassals, and betwixt the Vassals themselves, and consequently occasions of enquiring into, considering and determin-

*Origin of
the feudal
Law.*

^p Craig *Sovereignty of Scotland* 17.

^q *Corpus Juris Canonici* 305.

ing their reciprocal Duties and Rights. The Rules collected from such Decisions gradually, became known by the Name of the feudal Law, and so prevailed all over *Europe*, that for many Ages, Properties in Land amongst these victorious People were decided by this Law only. To pursue this Subject into its full Extent, would be to write a History of the Changes time has wrought in all the *European* Governments, which, the Foundation being now laid, might be done without any great Difficulty. But as some of the Authors necessary to be consulted for that Purpose are not now before me, and the present Design is limited to our own Isle, I shall here close this historical Narrative as to other Countries, and conclude this Chapter with some Observations that will be of Use in the Sequel, towards explaining the Constitution of the Legislative Power in this single Kingdom, which is the particular subject of the Residue of this Discourse.

*The Origin
and Measure of all
Power in
the Magistrate and
Subjection
in the
People.*

First, The Conquerors consisting of voluntary Societies, who acquired the Country they possessed, and consequently were Owners of the Territory; We may see the Foundation of all rightful Power amongst them, which is, I think, to be derived from two Foundations, *viz.* 1. As a voluntary Society, no doubt the

the Majority had a Right to regulate the Actions of each Individual, so far as it concern'd the Society, whilst the Individual continued a Member of it. And 2. As the Property of the Land was in the Conquerors, and no Person can enter on the Land of another without the Owner's Consent, and all Proprietors are free to give it under such Restrictions as they please: Hence arose a territorial Jurisdiction, and a Right to controul the Actions of Persons who were not Members of the Community as well as those who were, only with this Difference; that when the one left the Land the Right ceased, whereas if the other did, it still subsisted, unless the Party were also cut off from the Community. From these two Principles may be solved all the intricate Questions concerning the Power of the Magistrate, and Obedience of the Subject; from the same Principles also are to be derived the Origin and Measures of Power in all the lesser Seigniories, as well as those of the great Seigniorie of the Realm. Here also we see a plain Evidence of an implied original Contract betwixt the Governors and govern-
ed. For as no Man is by any Law in-
tended to part with any Part of his Pro-
perty without a Promise from the Re-
ceiver to give him an adequate Return,

*An impli-
ed original
Contract,*

*An Ex-
press origi-
nal Con-
tract.*

whence the very parting with a Shilling's worth of any merchantable Commodity is sufficient to entitle the Party, without proof of any express Promise for that Purpose, to recover an adequate Recompence. Is not the Reason much stronger to admit a tacit Contract amongst the Members of a Voluntary Society, and to suppose they did not part not only with a Part but all their Properties, even with their Liberty (if it can be parted with) and for nothing too? After express or written Contracts became in Use, this is more evident; for then the mutual Duties of the Members were regulated by the Declarations or Reservations of feudal Rights, and the Performance of these Duties were enforced by the reciprocal Oaths of the Superior and Inferior. These Oaths the Kings took at their Coronation, an Act originally something like the Investitures of subordinate Seigniores, and whatever it may be deem'd now, of the greatest Importance in the Judgment of our Ancestors, and their Kings; for the Commencement of their Reign, is not computed from the time of the preceding Prince's Death, but the Coronation of the Successor^r; nor till that was per-

^r Tyrill's *Introduction to the second Volume*, p. 125.

form'd,

form'd did he in his own Acts use, or the People attribute to him the regal Title[†]. When the King had taken his Oath, then and not before, till *Henry VI.* his Reign, did the Peers take the Oath of Fealty[‡]; whence was derived both in this and other Kingdoms the Oath of Allegiance now comprising the Heirs and Successors, tho' till late it extended only to the Person then crown'd. These two were the only Marks of Subjection to, and Measures of the Magistrate's Power, and the People's Obedience, and Due from them, by, and in consequence of their feudal Tenures, which are expressively defined by the greatest Man, and best Judge of such things that ever lived, unequal Leagues[×]. Every Prince in *Europe* and his Subjects being link'd together by feudal Tenures, mayn't we justly say there is a descent strong, direct, and indeed as obvious a Proof of an express, and as solemn an original Contract betwixt King and People (however it has been hitherto unobserved) as 'tis possible to devise, and as there is of any one Truth whatsoever.

[†] Idem, p. 115.

[‡] *Collection of the History of England in the Life of Henry the VIth.*

[×] Grotius de Jure B. & Pacis, lib. 1. c. 3. s. 23. p. 1.

*All the
Peers hold
of the Com-
munity,
not the
King only,
and the
Proofs of
this Posi-
tion.*

2^{dly}, The Peers, whether distinguish'd by the Names of Earl, Baron, or any other Denomination, notwithstanding they are vulgarly thought to have held of the King, yet their Tenures were originally of, and their Homage and Fealty consequently due to, the Publick, that is, to the great Community of the Realm, not of or to the King only; even as at this Day the *German* Princes hold of the Empire, not the Emperor ^a. This may be proved by the following Arguments:

1. As we have seen, the Armies of these Invaders from the North were compos'd of different Nations, or of the Detachments of the several Cantons of the same under several and respective Leaders, who all associated under one General of the Expedition; the Successors of the General became Kings, and those of the other Leaders Peers; the General was a temporary Officer, created only for War, and his Power determin'd with that; so that on Peace all returned to their original Equality: Hence we may infer, that as the other Chiefs were not his Subjects before the Commencement, so neither could they be properly styl'd so during the War; that

^a Striký Jus Feudale, 381. Hypolitus a Lapide de ratione Statús in imperio, 178.

after

after its Conclusion they were absolutely independent of him, and therefore owed him neither Service, Homage, or Fealty, which are due from every military Tenant to his Lord.

2. The Property of the Land was in the whole collective Body of the Conquerors, and not only in the General, and they only parted with the *utile*, not the *directum Dominium*, therefore the Service must be due to, and the Tenure to which Homage and Fealty are incident, of them.

3. If the Right to a Barony was controverted, the Decision of the Title never was, in the Times we speak of, claimed by any King^b; whereas if the Gift had been made by, or the Tenure of him, the judging Power would have been in him solely; for who should determine the Title to a Gift, but the Giver, or they that represent him, and succeeded to all his Rights.

4. The Service annexed to every Feud is like Homage and Fealty owing to the Lord; and comes in lieu of the Land: Now if the Tenure had been of the King, then would the Service have been for his private Benefit. Whereas that it was not so, is clear to a Demonstration;

^b Mezeray in Charlemagne, & ad An. 1217. & 1223. Vertot. Vol.2. 76. *Altesera de origine Feud.* 43.
for

for he could not transfer or alien the Service^c. Nor could any King in *Europe* oblige the Peers to attend him to any War he made for his own private Advantage ; because 'tis a known Rule of the Feudal Law, as understood throughout all *Europe*, that the military Service of the Peers was only due in case of an Invasion from abroad, or a Rebellion at home. In *Normandy* the Conqueror, when he desired his Barons to aid him in the War he was going to embark in against *Harold*, was told by them, that they were not obliged to assist in foreign Wars. Of the like Usages in *France* (and the Usages of that People being originally almost the same with the *Normans*, deserve a particular Consideration) we have the Testimony of two very considerable Authors. One observes, that tho' they were often divided into several Kingdoms, and sometimes divers Persons claim'd the Royal Dignity, yet the Dispute about the Crown did never involve the People in any War ; “ For
 “ in such case (says my Author) they
 “ commanded their Kings to try their
 “ Titles by Law (I suppose before the
 Peers, whose Right to judge of the Title to the Crown of *France* our *Ed-*

^c Cambd. Britan. 211. Dyer 44. Corvin. Jus Feud. &c.

ward III. and his Antagonist, when they put in their Claims, both seem to acknowledge) “ or if they refused so to do, by single Combat ; because ’twas not consonant to the Rules of Justice or their Usages and Customs, that the Commonwealth should be weaken’d, perhaps destroy’d, by the private Animosities or Quarrels of their Kings ^d.” The other bids his Reader remark (and well it deserves so to be) the Difference betwixt the Armies of *France* and the Kings; “ ^eFor, says that wondrous Author, when he made war for himself, he had only the Tenants of the Feuds he was in Possession of, and even they served with Regret; but when the Kingdom was concern’d, all the Force of it was in Motion, and every Chief came in Person, and brought his own Subjects with him.” Such also was the Law here in *England*; for Lord *Coke* says, the military Tenants were obliged to attend in the Wars against *Wales* and *Scotland*; because, as his Lordship writes, (how truly this is no Place to enquire) they were of right Subjects to the Crown of *England* ^f. And even at this Day, in the Empire, if

^d Agathias, lib. 1.

^e Mezeray ad annum 1124.

^f *Coke upon Littleton*, pag. 68.

the Emperor makes war of his own sole Authority, the other Princes sit unconcern'd at it, nor can he require any Supplies from them: When the Empire engages, then all proportionably contribute their Assistance.

And *Lastly*, (not to multiply Reasons for the evincing a Proposition in my Apprehension sufficiently proved) if one of the Peers refused to go, either not thinking it his Duty, or, though convinc'd of it, yet neglecting to perform it, neither the determining the Question of Right in the first Case, nor the Punishment of the Fault in the other, were lodged in the King, but the King and Peers, that is, the Parliament ⁸.

The Armies originally in the European Governments under a parliamentary Direction.

3dly, As if the King undertook a War on any other account than some one of the aforesaid Causes, the Tenants in Chief were not obliged to assist him; so even when they did it either by the Duty of their Tenures, or voluntarily, the manner it was done in is very remarkable; for the conducting the Army was not left solely to the Will of the King or General; but, if I may use the Expression, it was under a parliamentary Direction, every one of the Peers leading and commanding his own Vassals, who obey'd no Orders but

⁸ Idem 46, 72.

such as their own Chiefs gave them, and therefore were not oblig'd to go unless they went^h. On the whole, what greater Power had the King over such an Army than the *English* General had over the late confederate Forces in *Flanders*? Whilst this was conducted, as the Leaders that compos'd it thought answerable to the Ends 'twas form'd for, Submission was universal; when they thought otherwise, the General's Power was reduc'd to the Troops of his own Nation: So amongst these People, though the King might command his own Vassals, yet the Vassals of their Peers, if their Chief dislik'd his Orders, would pay no Obedience to them.

4thly, Tho' these victorious Nations were not so polite as their Posterity, yet were they far less barbarous than some imagine from the military Service annex'd to their Estates, and that Service being so honourable amongst them; for as we have seen by that they were not obliged to War for the gratifying the Pride or Ambition of any Person, nor was the fighting for such Ends thought honourable, but the doing it for the Defence of their Country from foreign or domestic Foes was; and so it ought to be in every well constituted State.

When military Service, when not.

^h Idem 68.

*How the
antient
free Go-
vernments
came to be
subverted.*

The *German* Nations continued long in their Conquests under such free Governments, and probably all their Posterity might have remain'd in the same happy State to this Day, if the Books of the Civil Law, which were buried in Oblivion for some time after they settled in the Western Provinces of the *Roman* Empire had never been brought to lightⁱ; for till then, as far as I have observ'd, no Prince in *Europe* ever imagin'd he had any Title to arbitrary Rule, but soon after they were discover'd, some Princes who had a false Notion of Grandure, which must be founded on Justice, made the *Lex Regia*^k a Colour for assuming despotick Power. For the sake of this Doctrine many Princes endeavour'd to introduce the Civil Law into their Kingdoms. Here 'twas unsuccessfully attempted^l; but it now prevails in the other Parts of *Europe*, even in *Spain*, tho' the reading it, for this Cause, was in that Kingdom once forbid under pain of Death^m. However, if this Law had been duly consider'd, it would

ⁱ Duck. de Jure Civili, 55.

^k Digest. lib. 1. tit. 4. sect. 1.

^l Instit. leg. 6. Fortescue de laudibus, &c. 77. Selden ad Fletam, 466, 472. Seldeni Janus 68. Davis of Tonnage and Poundage, 21, 22.

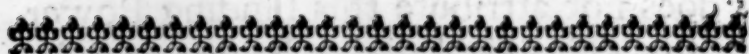
^m Duck. de Jure Civil. 252. Fabricii Bibliotheca Latina, Vol. 3. 830.

not have wrought so much Mischief; for it does not attribute this binding Power to any chimerical divine Right, but derives it to the Emperor by the Gift of the People at the Time of his Election. So that even this very Law, mention'd by a despotick Prince as the Foundation of his Power, proves that the Gift of the People is his Title; and yet so great a Part of *Europe* live in such a State, that 'tis to be fear'd some of their Posterity may justly apply to themselves what *Tacitus* writes of the *Romans* under *Domitian* ⁿ: *Dedimus profectò grande patientiæ documentum, & sicut vetus ætas vidit quod ultimum in libertate, ita nos quod in servitute; adempto per inquisitiones loquendi audiendique commercio. Memoriam quoque ipsam cum voce perdidissemus, si tam in nostra potestate esset oblivisci, quam tacere.*

ⁿ Tacit. Vita Agricolaë, c. 2.



CHAP.



C H A P. II.

*Of the Legislature or Parliaments
in England, from the coming in
of the Saxons, to the Norman
Invasion.*

*The Sax-
on Esta-
blishment,
and not the
British
to be en-
quired into.*

THAT the original Inhabitants of *Germany, Gaul* (now *France*) and *Britain*, were one People, and first known by the common Name of *Celts* is most certain. Some learned Persons have thought the first Inhabitants of *Illyria* and *Spain*, were also comprized under this Denomination^a, which is now more credible, since the Similitude of their Language has been so well manifested by the very Learned Mr. *Lhwyd* in his *Archæologia*. From their being one People tis probable that they had an Uniformity of Government; this seems also highly Evident from *Cæsar's* Account of the antient *Britains* and *Gauls*, the Observations made by the Learned Mr. *Rowland*, in his *Mona An-*

^a Mezeray p. 3. Cambd. Britan. 24.

tiqua and otherwise; but be this as it will, sure it is that the *Saxons*, when they possessed themselves of this Isle, subverted the antient Government of the *Britains*; therefore an Enquiry into it is not within the Compass of the present Design.

However *Gildas* represents our *Saxon* What the British Writers say of the Saxons may be justly questioned. Ancestors as mere Savages; yet that Author may be justly supposed to exaggerate their Defects, and the Irregularities which commonly attend a War. For it seems altogether improbable, that the *Britains* would have chosen them for their Guardians and Protectors, if they had been such brutal Animals as he describes them. It should be also consider'd, before his Representation of them is received for Truth, who the Person is that gives them so uncouth a Character, and he will be found to be one of the very People they conquered; a Circumstance that will surely rather incline us to seek a true Notion of these People from indifferent Writers, Circumstances, their Laws, and such other Evidences as yet remain. All which concur in giving us a more favourable Idea of our Ancestors; at least abundantly prove that time, and the Christian Religion so temper'd their former Ferocity, that for the regular Administration, and the pre-

E serving

serving the People in a real and unbounded Liberty, the only end of Civil Government, they equall'd, perhaps exceeded all other Nations.

*The Origin
of the Sax-
ons, and
that they
were a con-
siderable
People.*

As the Origin of the *Saxons* has been with great Accuracy explain'd by the Learned *Sheringham* in *Latin*, in *English* by the Industrious Mr. *Tyrell*^b, it may suffice in this Place to observe that the *Saxons*, though not mention'd, at least under that Name, by *Tacitus*, however soon after him are taken Notice of, and gradually encreased in Power, till at last they established their Usage for Law, in one half Part of what is now known by the Name of *Germany*, where it yet regulates not only the Properties of private Persons, but the Succession of, and Right to Sovereignities themselves^c.

*Of the Go-
vernment
of the Sax-
ons at
home.*

Tho' the *Angles* have denominated this Isle, and all our Writers denote by the general Appellation of *Saxons*, the *German* Nations that settled here; yet besides the *Angles* and *Saxons*, 'tis sure the *Goths* made part, and no inconsiderable part of those People; nor is it improbable that other Nations were also mix'd with them. That when they first arrived here they were Pagans is certain,

^b *History of Eng.* Vol. I. p.

^c Schilter Prefat. ad Jus. Feud. Aleman. & de Successione, &c.

and more than probable it is (tho' some Authors seem to think otherwise) that they had not, till after their Establishment here, the Use of Letters ^d. These three Nations, in their native Country, had independent Governments, and that they continued so long after their Settlement in this Isle, is evident from the Diversity of their Laws publish'd by *Lindenburg*; therefore it's clear no one Person could claim a Right to dictate Laws to these victorious People: Whence it demonstrably follows, that the legislative Power resided in, and was exercis'd by the People, or Persons who had an Authority delegated to them by the collective Body of the Victors.

From all these Peoples being *Germans*, and the great Conformity that appears between the Usages they establish'd here, and those that have been mention'd in the foregoing Chapter to have prevail'd throughout *Germany*, not only in Matters deducible by Reason from the obvious Rules of Justice, but also the most arbitrary Points of Law; it may well be presum'd, that the Government and legislative Power amongst the *Saxons* was the same it was amongst the other

^d Shering. 293.

German Nations^c. But we need not rely only on Probabilities ; for of this we have the express Testimony of one of their Historians, whose Book not being to be got, I must desire the Reader to accept of his Sense in *Verstegan's* Translation.

“ For the general Government of the
 “ Country they ordained twelve Noble-
 “ men chosen from among others for
 “ their Worthiness and Sufficiency.
 “ These in the Time of Peace rode their
 “ several Circuits, to see Justice and
 “ good Customs observ'd ; and they of-
 “ ten, of course, at appointed Times,
 “ met all together, to consult and give
 “ Order in publick Affairs. But ever in
 “ Time of War one of these twelve
 “ was chosen to be King, and so to re-
 “ main so long only as the War lasted ;
 “ and that being ended, his Name and
 “ Dignity of King also ceas'd, and he
 “ became as before. And this Custom
 “ continued amongst them until the
 “ time of their Wars with the Emperor
 “ *Charles* the Great ; at which time
 “ *Wittekind*, one of the twelve as afore-
 “ said, a Nobleman of *Angria* in *West-*
 “ *phalia*, bore over the rest the Name
 “ and Authority of King. And he be-

^c Nicholson de Jure Feudal. Sax. Wilkins in notis ad leges Saxon. passim. Brady's *Preface to his History*, 53, &c. Spelm. in voce *Feudum*.

“ ing afterwards, by the means of the
 “ said Emperor, converted to the Faith
 “ of Christ, had by him his mutable Ti-
 “ tle of King turned into the induring
 “ Title and Honour of Duke; and the
 “ eleven others were in like manner by
 “ the said Emperor advanced to the ho-
 “ nourable Titles of Earls and Lords,
 “ with Establishment for the continual
 “ remaining of these Titles and Dignities
 “ unto them and their Heirs.; of whose
 “ Descents are since issued the greatest
 “ Princes at this present in *Germany*.”

In the Period of Time that is now ^{Some}
 the Subject of our Consideration, there ^{Truths}
 being no Monuments of the *Saxons* ^{must be}
 older than the Establishment of Chri- ^{established}
 stianity, and so little Light to be got ^{as Ground}
 from those that are after, we shall be ^{for Argu-}
 oblig'd more frequently to have Re- ^{ment.}
 course to inference from those few
 Truths that are known, for the Discove-
 ry of the Constitution of the Legisla-
 ture. Therefore, reserving the men-
 tioning those Evidences that occur in
 History, the *Saxon* Laws, or other Me-
 morials of those Times, which have with
 great Industry been gather'd by Mr. *Tyr-*
rel, to their proper Place in the Sequel
 of this Discourse; as in all Argumenta-
 tion some Principles ought to be laid
 down, from whence the proper Deduc-
 tions to discover what we seek may be

made ; so in this Case I must premise these three Propositions :

Three proposed for that Purpose.

1st, That as all the *German* Nations lived under one Form of Government, and establish'd like ones in the several Countries they conquer'd ; 'tis to be presumed, that the *Saxons*, who were a *German* People, lived at home under the same Government the other *German* Nations did, and when they conquer'd *Britain*, established a Government here of the same Form they had lived under in their native Country ^f.

2^{dly}, That the Feudal Law prevail'd in the *Saxons* Time, and therefore that Law being deduced from the Usages of the northern Nations in *Germany* ^g, 'tis to be believed that the *Saxon* Government, as all the Governments in *Europe* establish'd by the *German* Nations were, was also built on, and deriv'd from that Law.

3^{dly}, What is said in the *Mirror of Justices* concerning the Establishment of the *Saxons*, and their Government, ought to be receiv'd for Truth.

The two last only want Proof.

The first of these Propositions carries its own Evidence with it, and cannot be deny'd by any Lover of Truth ; with others it is Folly to reason. The two

^f Spelm. in Glos. voce *Feudum*.

^g Grotius de Jure Belli & Pacis, lib. i. c. 3. f. 23.

last indeed seem to want some clearing, the one having been deny'd, and the Authority of the *Mirror* weakned ; therefore we will now proceed to the establishing these Truths, that the Arguments drawn thence may have their just Weight.

'Tis the Opinion of Sir *Henry Spelman*, that the Feudal Law was introduc'd here by *William I.* On the other side we are told, Sir *Roger Owen*, in a Manuscript Treatise, has prov'd that the Feudal Law, even with all its Appendages of Wardship, Marriages, &c. was in force here in the *Saxons* time ^h.

That the Feudal Law was in use in the Saxon time.

The incomparable Mr. *Madox* most justly observes, that notwithstanding the Controversy that has been concerning Feuds, and the Feudal Law's being in force in the time of our *Saxon* Ancestors, the Question was never distinctly stated, without which it cannot be solv'dⁱ. The learned Bishop *Nicholson*, in his Dissertation on this Subject, has pursued the Hint given by Mr. *Madox*, and distinguish'd the Feudal Law into these several Periods, which he terms its Birth, Infancy, Youth, and State of Perfection. The first he limits from the time of the Irruption

The several Ages of the Feudal Law.

^h Tyrel's *Introduction to the History of England*, p. 3. Hicks Dissertat. Epist. &c.

ⁱ *History of the Exchequer.*

of the northern Nations, which happen'd about the Beginning of the fifth Century, to the Year 650. It's Infancy from thence to the Year 800. The third Period from thence to 1027. Soon after which it arriv'd to its State of Perfection^k. That the Feudal Law, as understood in this last period of time, was unknown to our *Saxon* Ancestors before the *Norman* Invasion, is beyond doubt; but that in the first, if not in the second and third State, it flourish'd here, may be evinc'd by the following Reasons.

*Reasons to
shew it
was in
force in the
Saxon
times.*

1st, There are as many Footsteps of the Feudal Law amongst the *Saxons* as amongst the several Laws of the other Nations publish'd by *Lindemburgh*, not excepting the Laws of the *Lombards* themselves; and yet the learned Publisher of that Collection observes, in his Preface, that the beginning of that Law may be discern'd in them. Which Observation is as applicable to the *Saxon* Laws, there being so great a Parity betwixt them.

2^{dly}, As 'tis obvious from the foregoing Chapter, that it was gradually produc'd from the Usages of the *German* Nations, so there being an Uniformity of Usages at Home, and of Circum-

* Vid. Craig. de Feudis, p. 20, &c.

stances abroad, 'tis to be presum'd they had a like Effect.

3dly, Some Authors attribute the very Origin of the Feudal Law to the *Saxons*, others to the *Lombards*. Now the *Lombards* and *Angles*, from whom our Isle is denominated, were one People, tho' distinguished into several Cantons¹; therefore if the Origin of the Feudal Law be attributed to the *Lombards*, 'twill be hard to conceive why the same might not as well be introduc'd here by the *Angles*, as 'twas by the *Lombards* in *Italy*. The Reason will yet be more cogent, if we suppose the *Saxons* first instituted this Law. Which Supposition a very learned Author seems to incline to, by saying, That 'tis certain the Feudal Law prevail'd most antiently amongst the *Saxons*^m. And there is yet extant a System of it, according to their Usages, which another very competent Judge affirms to be the oldest of any whateverⁿ.

4thly, There's no Rule of the Feudal Law so old as the first or second Period of Time, that was in use in any foreign Country where 'tis confess'd the Feudal Law did prevail, that was not

¹ Shering, 29.

^m Craig. de Feudis, 25.

ⁿ Strykius de Feudis, 93.

in force amongst our *Saxon* Ancestors °.

5thly, Many Usages were in force here that were unknown till the Feudal Law was introduced, and never prevail'd in any Country where that was not in Use; as Homage, Relief, Heriots, the Law of Compurgators, &c.

The Antiquity of the Mirror, when first questioned.

Mr. *Selden* first observ'd the old Law Book, call'd, *The Mirror of Justices*, could not be so antient as the Chief Justice *Coke* and some others pretended ¶. Bishop *Nicholson*, in his *Historical Library*, concur'd with *Selden* †; and Dr. *Hicks* copies after these learned Authors §. But I think all that *Selden* or the Bishop assert, is, that *Horn* lived in the Reign of *Edward II.* some other Authors say *Edward I.* and that the Book, as it now stands, is not so antient as the *Saxons* time. As their Reasons will not prove, therefore their Authority cannot be urged to support what Dr. *Hicks* would insinuate, that the whole Book is a Composure of so late a Date as *Edward II.*^{d's} time. That the Shape it now appears in mayn't be older, is readily admitted, and that 'tis not come to us free from Interpolations, will not

A Conjecture concerning it.

° Nichol. Dissertatio Ep.

¶ Craig's *Sovereignty of Scotland*, 156.

¶ Dissertat. ad Flet. c. 1. in notis ad Fortescue, p. 3.

‡ Pag. 229.

§ Dissertat. Epistolaris, 43.

be denied : But why mayn't we suppose the Book was a Translation of some Manual of the *Saxon* Laws put into *Norman French*, with such Additions as *Horn* thought proper, to accommodate it to the Usages of the Time he lived in ? The Book being a System of Laws, expos'd it to Attempts of this Nature more than any other : And we know this has frequently happen'd to Law-Books ; might not this Book have the same Fate ? Let it be farther consider'd, that *Horn* could have no visible Reason or Motive for attempting to deceive Posterity. These Conjectures are submitted to the learned Reader's Judgment. But be it as it will as to them, sure it is, that this Book contains what our Ancestors thought Truth three hundred and fifty Years ago, and never was controverted till lately ; we may therefore rely, I think, on all that occurs in it which cannot be falsify'd.

These Principles premis'd, I now proceed to enquire who were the Persons that compos'd the *Saxon* Legislature. In this the following Method shall be pursued.

1st, The Opinion of Dr. *Brady*, with his Reasons, and the Objections that occur to it, shall be stated.

2^{dly}, That of Mr. *Tyrrel* in the same manner.

3^{dly}, Since

What Method will be pursued in enquiring into the Saxon Legislature.

3dly, Since the Hypotheses of both those learned Gentlemen are liable to just, and to me unanswerable Objections, another will be proposed, which I shall never think my self engaged to support farther than it shall be found agreeable to Truth.

Dr. Brady's
Opinion.

Dr. *Brady* without Distinction asserts, That from the *Saxon* to the *Norman* Invasion, Laws were made by the King and an hereditary Nobility. To make good which, he affirms, That by the Word *Witena Gemot*, we are to understand a Meeting of an hereditary Nobility, and that therefore the Commons had no Share in the Legislature.

This Hypothesis is liable to the following Objections.

Objections
to it.

1st, Since in *Germany* all had a Share in the Legislature, by what occasion or means came that natural Right, which is so annex'd to every Freeman, that when he parts with it (supposing he can divest himself of it) he loses that Name; which way, I say, or by what means did the Commons amongst our *Saxon* Ancestors depart from their Share in the Legislature?

The Meaning
of the
Word *Wita*.

2dly, Dr. *Brady*, for the establishing this monstrous Doctrine, relies much on the Word *Wita*, which, according to him, signifies Wisemen, Judges or Lawyers,

Lawyers, and Noblemen. The first of these Expositions is incontestably true : The second, tho' advanced by the Doctor, is very insufficiently prov'd, tho' it is of the utmost Import to the Discovery of what we both seek. He only cites *Hotoman's* Interpretation of the co-significant *Latin* Word *Sapientes* in the same Sense : And even in this the Doctor either writes uncorrectly, or is grossly deceiv'd ; for Lawyers there were none by Profession amongst the *Saxons*, no nor for many Years after the *Norman* Conquest, besides the Ecclesiasticks. Nor is the Doctor's Error, with relation to the disjunctive Interpretation by the Word Judges, less exceptionable, if the Word is to be understood in the Sense it bears now, and was understood in when the Doctor wrote ; because the known Notation of the Word then, and now is, certain Persons who by a delegated Authority from others determine the controverted Rights of their Fellow Subjects ; whereas in the *Saxon* time, and long after, both here and in other Parts of *Europe*, every Member of the several and respective Communities of the many States our *German* Ancestors divided their Conquests into, were Co-judges, even as now the four Judges of *Westminster-Hall* are in their different Benches.

Benches. Therefore this general Assertion was inaccurate and untrue, but with proper Restrictions may be admitted ; for in every Community, whether Ecclesiastical or Civil, some Persons presided in the Guilds or Fraternities, and consequently in the Judicatures appertaining to them. These, as appears by other Authorities, were by the middle aged Writers term'd *Sapientes* ; and that they were the Persons our *Saxon* Ancestors term'd *Wites*, is, as I conceive, apparent from the following Reasons :

I. The Assembly of the *Saxon* Legislature after the Distribution of the Heptarchy, is in the Monuments of those Times call'd *Witena Gemot*, or *Witena Mot*. That *Wite* signify'd Wisemen is already noted to be agreed by all ; nor is it less clear, that the presiding Judges in every Community, Ecclesiastical or Civil, that were originally instituted, were Members of it, and that in consequence thereof the Word *Wita* did signify the presiding Judge : And when it is clear it did denote some of that Rank, and absolutely certain, that after the Subdivision of the Kingdom into lesser Districts, and, consequential thereunto, of the judicial Power, the Word *Wita* is applied to other Persons, is it not highly probable that they were
also

also the presiding Judges in the several parts of the Shires? And will not this seem yet more so, if it appear in the Sequel, as I trust it shall, that when this Word was first used, there were no Ranks or Orders of Persons known to our *Saxon* Ancestors, besides that of Magistrates and Freemen. But this Truth is not only evident from Reason, but also by the Authority of the *Saxon* Glossarist, by whom 'tis clear 'twas co-significant with the Word *Ge-refa*.

2. It was not, the Circumstances of those Times consider'd, an improper or harsh Metaphor to denote the presiding Judges by a Word that properly and directly signified Wisemen, those Magistrates being, at the time the Word was first so apply'd, elective, and all the secular ones at least annual, and therefore probably chosen for their being eminently possessed of that Quality, to preside in their respective Communities, and by their Wisdom to moderate, allay, or compose all Differences that arose amongst the Members of their respective Societies.

That the third Gloss is erroneous, may be prov'd from the very Passage out of King *Ina's* Laws cited by the Doctor himself in his Exposition of this Word; for in the time of that King, who rul'd
thirty

thirty eight Years, and commenc'd his Reign in or about the Year 688. nor for long after, there were neither here in *England*, nor in any of the other Western Provinces of *Europe* where our *German* Ancestors settled themselves, any Noblemen besides the annual and elective Magistrates, which the Doctor does not mean by that Word ; for according to that Sense, the Commons had a share in the Legislature, which the Doctor does absolutely deny. The other Authority he cites to maintain his extravagant Position, is *Sommer's Saxon Dictionary*, which, if fairly stated, will as little avail : For tho' that very great Man does, amongst other Expositions of this Word, use that of Noblemen ; yet in the very next Column, explaining the Word *Witena*, when being conjoin'd with the Word *Mot*, or *Gemot*, it signifies the Legislature ; (and it's Meaning then is all the Doctor and I seek.) That truly great Man writes in this manner ; “ *Syn-*
“ *odus Sapientium, Prudentium Con-*
“ *sessus, Concilium, Comitia* ; a Synod,
“ Council, or Assembly of Counsellors,
“ a Meeting of Wisemen, as in Parlia-
“ ment. ”

Mr. Tyr-
 rel's Opi-
 nion.

Mr. *Tyrrel* supposes that not only the Nobility, I mean the Persons we now understand by that Expression, but also
 that

that Rank of Persons amongst the *Saxons* that are distinguish'd by the Appellation of *Thanes*, were also Members of the *Saxon* Legislature, and that the Boroughs were represented. So much of his Hypothesis as relates to them, is, I think, in the manner we shall explain in the Sequel, true ; but I cannot believe *Thanes* sat in the *Witena Gemot*, for the following Reasons :

i. The *Thanes* were only Tenants by Serjeanty. (The Reader will here permit me to assume that which in the Sequel will be prov'd) Now to suppose the Tenants by Serjeanty were Members of the *Witena Gemot*, is what never was advanc'd by any one, and seems inconsistent in it self, and with the Nature of the Service, which was merely personal, without any Respect to the Publick. And indeed this Supposition seems to be attended with a fatal Consequence, which however ought not to be imputed to the learned Author, who was undoubtedly a Lover of Truth and Liberty. The Consequence I mean is this, if by being the King's *Thane*, or Tenant by Serjeanty, the Party had a Vote in the *Witena Gemot*, the King might always do whatever he pleas'd ; for he had Power to take as many Servants as he pleas'd, and in consequence thereof,

*Objections
to it.*

thereof, to erect as many Tenures by Serjeanty as he pleased, and therefore to nominate a Majority of Members in the *Saxon* Parliaments.

2. In the Titles of the *Saxon* Laws no mention is made of any *Thanes*, tho' many other Ranks of Persons are noted: And surely, if they had been Members of it, in some of the Titles we should have found the Word *Thane*.

3. In the *Saxon* Laws all Persons Lives have a Valuation, which in their Language is called *Weregild*: By the Proportion of the Valuation it appears that the *Thanes* were an inferior Order of Men.

I am now, according to the proposed Method, oblig'd to the adventurous Task of offering to the Reader what, as far as I can yet discern, was the Constitution of the *Saxon* Legislature. That I may lay before him my Apprehensions on this Subject in the best manner, I must desire him to bear this Truth in his Mind, that in every Government, Power results from, and is the natural Consequence of, Property or Estates; and that in all Places where Tyranny does not prevail, the Persons who compose the Legislature, derive that Power from the Interest they have in some Lands,

that

that are part of the Territory of that Society to which they belong, or else from some Distinction of Rank and Order, which discriminates the Members of a Society. Therefore to discover who were the Legislators in the *Saxon* time, it will be necessary first to remark the Manner they settled themselves in this Isle, (whence the Persons who were Proprietors of Land will be obvious) and also how many Ranks of Persons may be found amongst them.

The *Saxons* originally divided their Conquests in this Isle into as many Shares as the King had Companions, so my Author terms the Persons in *Latin* styl'd *Comites*^a; for there were Earls long before *Alfred's* time^b. These Portions of Land were originally called Shares, latterly Shires, which were then, to use a learned Author's significant Words, "so many Associations or Societies in publick Charge or Service^c;" as the Cantons were in *Germany*. Thus things continu'd till the utter Dissolution of the Heptarchy, which I date from *Alfred's* Reign; for tho' *Edgar* is generally counted the first universal Monarch of

The Manner the Saxons established themselves in England.

^a Mirror, c. 2. Fleta, l. i. c. 17. f. 9. Bracton, l. 2. c. 16.

^b Spelm. voce *Comes*.

^c Bacon of the Government of England. p. 65.

the whole Isle, yet in truth the Space betwixt his Reign and *Alfred's* seems to have been a time of Unsettledness and Confusion; such Prince amongst the seven who happen'd to be the mightiest, acting as, and being generally accounted the supreme Ruler over the others^d. This King uncontestedly had a Superiority, and reduc'd the whole into a regular and well digested Form of Government. Some Historians, in an undetermin'd manner, attribute to him the Division of the whole Realm into Shires; which in general cannot be admitted for Truth. But if it be understood of the Shires 'tis now divided into, and that the old ones were so antiquated or varied, that with respect to what is now in use, it may be deem'd the Work of that King; this Position, so limited, may be true. However, most certain it is, that he first subdivided the Shires into Trythings or Laths, Hundreds or Wapentakes, as they are yet commonly called North of the *Trent*, and them into Tythings^e, which were also promiscuously at first call'd Boroughs

The Division of the Kingdom into Shires, &c.

^d Brady's *History*, 100, 103, 111, &c. Cambden's *Brit.* 226, &c.

^e Brady's *Preface to his History*, 116. Spelm. voce *Comites*. Cambd. *Brit.* 346. Fortescue on Fortescue, 114, &c. Wilkins voce *Centuria*. Brady's *History*, 84, &c.

as well as Tythings^f; tho' in most Places in *England*, *Kent* excepted, where the Word is yet used in that Sense, they are only called Tythings, and the other Appellation is appropriated to Places that send Representatives to Parliament. By the Laws of this King every Person in these Tythings were to be Security for the Behaviour of one another; and for this Cause all Persons were oblig'd to live in some one, or be kill'd. The like Law prevail'd in *France*, tho' its Breach was less penal^g.

As the People encreased in Numbers, they spread and inhabited other Places within the Precincts of the Tythings, which by being inhabited became known, and were distinguish'd in our Law Books by the Name of *Hamlets*, from two *Saxon* Words, *Ham*, which signify'd a Dwelling, and *lett*, which signify'd to assign. Yet having acquir'd Inhabitants, and in consequence thereof a Name, subsequent to the Division of the Kingdom by *Alfred*, they did not compose separate Societies either in ecclesiastical or civil Affairs, but remain'd Members of the Tything, Manours, and Parishes to which they originally belong'd^h.

*Origin of
Hamlets.*

^f Lambard's *Perambulation of Kent*, p. 24. Ælfrici Glof. voce *Curialis*.

^g An. Dom. de Alod. c. 13.

^h Finch, l. 2. c. 1.

In this Distribution of the Land, many things deserve Observation; such as may be of use in the present Design, are as follows :

*Tythings
unequal.*

i. That the Tythings, their Division being founded on the Number of Families, and not on the Extent of Ground, must be unequal; for the Proprietors of Land all resided on their Estates, whence they were in After-ages denominated Manours, *à manendo*. And as there were no little Freeholders in those early Days, nor for long after, ten such Families must necessarily be remote from one another, and occupy a large Space of Ground. Whereas Tradesmen, because many of their Arts and Occupations are auxiliary and subservient to one another, were engag'd by the prevailing Tye of Interest, as well as the natural Inclination to Society that is planted in human Nature, to unite and live contiguous to one another,

*What's to
be under-
stood by ten
Families*

2. However obvious the Meaning of the Words *Ten Families* may seem, yet in Truth it is not so; for by that Expression we now understand ten Housekeepers: Which Sense it cannot be on this Occasion understood in; for then many Counties having but three or four Hundreds, could have but three or four hundred Houses in them.

To discover then what is to be understood by ten Families, we must look into some Circumstances of those Ages. The lowest Rank of Men amongst the Proprietors of Land in the *Saxon* time, were the *Thanes*. What his Possessions were may in some measure be discover'd by the Law that advances a *Caorl*, or Boor, to an equality with a *Thane*, by his having five Hides of Land, a Hall, a Kitchen, and a Church. Here is a just Description of a Lord of a Manour; for many Parishes and Manours yet, and it may, I think, be proved that all originally were co-extensive. It may be further observ'd, that these Proprietors of Land, even as it had been used in *Germany*, manur'd it not with their own Hands, but by their Slaves and Hirelings, and, as I take it, constantly supply'd their Labourers with Victuals; for, as all the Glossarists agree, the well known Word Lord is derived from the *Saxon* Word *Hlaford*, which signifies a giver of Bread. Now tho' many of these Labourers might not perhaps lodge under their Lord's Roof; yet considering they serv'd him, and he fed them, even in the modern Sense, they might all be counted part of his Family, notwithstanding some dwelt

† Verstegan 316. Wilkins & Somner in Glossar. &c.

perhaps with their Wives and Children in little Huts erected on some part of their Lord's Estate, as we may well believe they did, from the frequent Use of the Words *Cottarij*, *Bordarij*, &c. in *Domesday*. If then all the Persons resident on a Manour were deem'd in the *Saxons* time, as 'tis, I think, sufficiently clear'd they were, part of his Family, we see what a Tything was; for that ten such Families might constitute one, is consistent with Reason, and all that we know of the *Saxon* Government.

As the Words ten Families are not, in my Apprehension, to be understood of the Families of every little Housekeeper in the Tythings that have been just now treated of; so neither can I conceive that the Tythings amongst the trading Part of the Nation consisted only of ten such Families of Shopkeepers as we now see. But it seems more probable, that several Handicraft Persons associated themselves in Partnerships or Companies, which are in the *Saxon* call'd *Guilds*: Nor is it unlike that some more eminent might employ great Numbers of Artificers, who were some, perhaps, Hirelings, or their Slaves to work under them; and if we understand by the Words ten Families amongst the trading Part of the Nation,

Nation, ten such as are here represented, we may well conceive that they constituted Towns or Boroughs.

It may be, perhaps, objected, that according to this Hypothesis, ten trading Companies or Families which employ'd a great many Artificers under them, were as much consider'd as the Possessors of Manours; which is certainly Truth, and on due Consideration cannot seem strange: For 'tis plain by the *Saxon* Laws, that Rank was in their Constitution, as 'twas in many others, annex'd to Possessions. Thus 'tis expressly declared, that if a *Caorl*, that is, a Yeoman or Boor, throve so well as to have five Hides of Land, a Church, and a Hall, he was equal to a King's *Thane*. Again, 'tis in another Place provided, That if a Merchant cross'd the Seas three times on his own Substance, that he should be equal to a King's *Thane*. And if we look even in our own times, we shall see many single Tradesmen of much greater Wealth and Power than many Lords of Manours, and trading Boroughs vested with a greater Share in the Legislature than fifty of them.

The several Families that constituted these Subdivisions being antecedent to this Distribution, many of them Neighbours, and Relations, not only by Marriages,

*Every Ty-
thing a
little State.*

riages, but also, considering the Method we observ'd the northern Nations to have proceeded in planting their Conquests, probably descended from one common Ancestor, easily coalesced into petty States, and form'd Communities different from the Shires in nothing but the Number of Inhabitants, and Extent of Ground. And as in the first Distribution of the Kingdom into Shires, there were Persons chose whose Office it was to preside in the general Assembly of every County, so was there the like in these lesser Districts on this Subdivision; for before that we find no other Magistrate but the *Ealderman*, or *Sbere Gerefa*; after it, we find this Word applied, in the manner there was occasion to remark before, to the Magistrate of every one of these Districts. And even at this Day the chief Persons in each Tything are called *Borsholders*, which is a Corruption of the *Saxon* Words *Burgh Ealder*, *Headborough*, and *Tything-Man*; which last are too well known to want Explanation.

The Magistrates in these Tythings.

In whatever View our *Saxon* Ancestors consider'd the Magistracy of these Divisions, whether, according to the modern Mode, as an Object of Desire, or, which is more agreeable to the Simplicity of those times, 'twas thought a Burden to be

be shunn'd, yet 'tis sure 'twas confer'd by Election ; for where all Persons are equal, there can be no other Foundation for determining who shall receive an Honour, or be loaded with a Burden.

Every one of these little Republicks, The Tythings had Courts. amongst the other Rights of Sovereignty they were vested with, also exercis'd a judicial Power within the Precincts of their own Territories, and had some publick Places where the Individuals met to determine any Controversies amongst their Fellow-Members^k. Many of these are vanish'd, and even their very Remembrance is gone. In *London* and some other Places they yet subsist, and are called the *Hustings*, from two *Saxon* Words, *Hus* and *Ting*, which signify the House of Pleas. These Jurisdictions, as Lord *Coke*, tho' no Friend to any Court but those of *Westminster-Hall*, asserts were original, and not deriv'd out of them^l.

All the *Saxon* Laity may be divided The Ranks of the Saxon Laity. into the Magistrates, or those that were not : Under those we comprise the Earls, and all those Officers they called *Greves*, of which sufficient has been said already. These are the Persons who were

^k Fleta, lib. 2. c. 5.

^l 2 Instit. 327.

known by the Names of *Thane*, *Under-Thane*, and *Caorl*.

^{of}
~~Thanes.~~ Various are the Opinious of the Learned who have wrote concerning *Thanes*, the Enumeration and Examination of each Opinion would be too large a Digression. It may suffice in this Place to refer to them in the Margin ^m, and observe, that the Word is deriv'd from the *Saxon* ðeiman, and is constantly render'd *Minister*; only in *Domesday* the Word *Servientes* is often apply'd to the same Persons who are there stiled *Thanes* and *Ministers*; and mention is also made in that great Record of their Offices, as Chamberlain, Hawker, and Hunter, which, in the Dialect of our Age, is Master of the Hawks, and Master of the Hounds, and many such like; and were, in one Word, the same Persons and Service that in the *Norman* time were called Tenants by Serjeanty, and, if I guess right, owe their rise to the following Caule.

When time had polish'd the *Anglo-Saxons*, for this Word does not occur in the oldest Monuments, many Offices that the great landed Proprietors discharg'd at first in their own Persons, as was used in *Germany*, on the Motives

^m Spelman's *Remains*, 16. Selden *Specileg. ad Eadmerum*, p. 170, Wilkins voce *Thane*.

of Necessity sometimes, Ease and Grandeur more frequently, were by them devolv'd on others. As in those Days, for want of Money, most Commerce was carried on by Barter, and the Rents were paid in Part of the Produce of the Soil; so for the same reason was there a Necessity of finding some other Method of Retribution, or rewarding Persons for Services, than paying them in Money: Hence arose the giving Land in lieu of, and recompense for, personal Service. This seems to be strongly supported by the Writ of *William Rufus*; ⁿ from which one may collect, that *Tain* Land paid no Rent, and that consequently the Superior had the Tenants Service in lieu of, and recompense for, his Land.

Thanes are divided into greater and lesser, only differing in this, that the greater held of the King, and the lesser ^{Two sort} of *Thanes* of some Subject.

The *Caorl* was what we express now by the Words Boor, Husbandman, and Farmer; a free Person who lived by manuring another Person's Land ^{Of the} ^{Caorl.} °, at first probably for Victuals, and after when Leases became in use amongst the *Saxons*, in return for the Occupation of it, by

ⁿ Brady's *Preface*, 24. Vid. 2 Inst. 631. Seld. *Janus*, 93.

° Spelm. *Remains*, 14.

way of Rent, deliver'd Part of the Produce of the Soil to the Owner.

The Titles of the *Saxon* Laws mention various Persons as Legislators, which for the Reader's better Satisfaction are represented in the ensuing Table in two Columns, the one contains them in *Saxon*, the other in *Latin*, as render'd by the learned Dr. *Wilkins*.

Leges Hlotarij & Eadrici.

bloþæne 7 Eadric	<i>Hlotharius & Ea-</i>
Lantpapa cýningar	<i>dricus Cantuario-</i>
aretton þa æ þa þe	<i>rum Reges consti-</i>
heopa alþonar ær	<i>tuerunt leges has,</i>
þeopofhton þýrrum	<i>quas ipsorum Seni-</i>
domum þe hýr ef-	<i>ores statuerant an-</i>
ter fægeþ:	<i>te hæc Iudicia quæ</i>
	<i>postea edicuntur.</i>

Leges Wihtrædi.

Ðam milþertan	<i>Mitissimi Cantu-</i>
Lýninge Lantpapa	<i>aria Regis Wihtræ-</i>
þihtpæde Rixigen-	<i>di regnantis quinto</i>
dum þe fýftan pin-	<i>anno regni, indic-</i>
trna hýr nices. þý	<i>tione nona, die sex-</i>
nigudan gebanne	<i>to Augusti, in loco</i>
rextan dæge Au-	<i>qui vocatur Berg-</i>
gurger. in þæne	<i>hamstede, congrega-</i>
ftope þý hat-	<i>tum fuit optimo-</i>
te	<i>rum</i>

te Berghamr tȳde. *rum procerum Con-*
 ðær pær ȝeramnad *filium. Ibi erant*
 eadigra ȝeheaten *Birhtwaldus Bri-*
 blíc ymcyme ðær *tannie Archiepis-*
 pær Bīhtwālð Bne- *copus & ante nomi-*
 tone heahbīrcop. ȝ *natus Rex, Roffen-*
 ȝe æpne mða Lȳ- *sis etiam Episcopus,*
 ninȝ eac þan hƿo- *quem omnes Gib-*
 ƿercear tpe Bīrcop. *mundum vocabant,*
 ȝe ilca Lȳbmund *& dignus vir erat.*
 pær haten. and pærð *Et loquebantur om-*
 pær. ȝ cpæð. ælc *nes Ecclesiastici or-*
 had cīpicean ðære *dinis dignitates u-*
 mæȝde anmodlice *nanimiter cum po-*
 mid hȳ hepſuman *pulo sibi Subiecto.*
 ſolcȳ:

pær ða eadigan *Ibi optimates illi*
 ſundon mid ealra *omnium assensu hæc*
 ȝemedum ðar do- *fecerunt Iudicia, &*
 mar. ȝ Lanſpapa *justis Cantuariorum*
 ƿiſitum þe apum æc- *institutiſ adjunxe-*
 ton. ȝpa hit hȳn *runt, prouti hic in-*
 eƿteſſe ȝe ȝcpȳþ: *fra ſequitur atque*
dicitur.

Leges Inæ.

Iner Lȳninger *Inæ Regis Statuta.*
 aretnȳſſe: *Ego Ina Dei gra-*
 Ic Ine mid Godeȝ *tia Occiduorum Sax-*
 ȝȳſe. ƿeſtſe axana *onum Rex, cum con-*
 Lȳninȝ. mid ȝe- *ſilio & cum doctri-*
 þeah te *na*

þeah te 7 mid læpe *na Cenredæpatris*
 Lenreder mineſ *mei, & Hedde E-*
 rader. 7 Hedder *piscopi mei, & Eor-*
 mineſ Birceoper. 7 *kenwolda Episcopi*
 Eorcenpolder mi- *mei, & cum omni-*
 ner Birceoper. 7 *bus meis Senatori-*
 mid eallum minum *bus, & senioribus*
 ealdorþmannum. 7 *sapientibus populi*
 þam yldeſtan pi- *mei, & multa etiam*
 tum minre þeode. 7 *societate ministro-*
 eac mycelre ge- *rum Dei, consulta-*
 romnunȝ Eoder *ham de salute ani-*
 ðeopa. þær ȝmea- *mæ noſtræ, & de*
 zenðe be ðære hæ- *fundamento Regni*
 lo uia ȝapla. 7 be *noſtri, ut juſtæ Le-*
 ðam ȝtaþole uer *ges, & juſta ſtatu-*
 riſcer þ̅ te ȝȝht *ta per ditionem no-*
 æpe. 7 ȝȝhte cȝne- *ſtram ſtabilita &*
 ðomaſ. þuþh upe *conſtituta eſſent, ut*
 folc ȝeſærtenode. *nullus Senator nec*
 7 ȝetȝȝmede þæ- *ſubditus noſter poſt*
 ȝon. þ̅ te nænȝ *hæc hæc noſtras le-*
 ealdorþmannæ. ne uȝ *ges infringeret.*
 underȝeþeodenþa.
 æfter þæm þære
 aþenðende þær upe
 ðomaſ.

Leges Ælfredi.

Ðiſ ȝȝnðon ða *Hæ ſunt Leges*
 ðomaſ þe Ælȝned *quas Ælſfredus Rex*
 þe Lȝninȝ ȝecear. *conſtituit.* Et

Et infra.

Ic ða Ælfræd Ly- *RE go Ælfredus*
 ninȝðær toȝædepe *e x in unum colligi*
 ȝeȝadepoð. ȝ appi- *Et literis consignari*
 tan het. maneȝa *jussi, multa eorum*
 ðapa ðe upe ȝone- *quæ Parentes nostri*
 ȝengan heoldon. *observabant, quæ*
 ðapa ðe me licodan. *mibi placebant, Et*
 ȝ maneȝe ðapa ðe *multa eorum quæ*
 me ne licodon ic *mibi non placebant*
 apearp mid minra *rejeci cum meo sa-*
 ptena ȝeþeahte. ȝ *pienti Consilio, Et*
 on oþþe ȝiran be- *alio modo jussi ob-*
 beað to heoldanne. *servari. Quoniam*
 Forþam ic ne doȝr- *non audebam tenta-*
 te ȝedȝyrȝtlæcan *re meorum (statuto-*
 ðapa minra apuht *rum) aliqua scrip-*
 ȝeala on ȝeȝrit *tis consignare. Por-*
 ȝettan. Forþan me *ro etiam me latuit*
 ȝær uncup hƿæt *quid eorum placue-*
 ðær ðæm lician *rit illis, qui nobis*
 polde þe æfter uȝ *succederent. Ast*
 ȝæpon: Ac ða ðe *cum deprehenderim*
 ic ȝemette aþær *sive in diebus Inæ*
 oþþe on Ineȝ dæȝe *cognati mei, vel in*
 mineȝ mæȝeȝ. oþþe *Offæ Merciorum*
 on Ofſam Mȝȝce- *Regis, vel in Æ-*
 na Lyninȝeȝ. oþþe *thelberti, qui pri-*
 on Æþelbȝȝhter. ðe *mus Baptisma ac-*
 æȝeȝt ȝalluht on- *cepit in natione An-*
 ȝenȝ *G glica,*

ƿenȝ on Angel glica, ea quæ mihi
 cýnne. Ða ðe me justissima videban-
 nihterƿ Ðuhton. ic tur, exinde collegi,
 Ða heƿ on ȝeȝaðe- & reliqua neglexi.
 ƿode 7 Ða oþƿe Ego Ælfredus Oc-
 ƿoplate: Ic Ða ciduorum Saxonum
 Ælƿƿeð ƿerƿ-ƿeax- Rex omnibus meis
 na Lýning eallum sapientibus hic usus
 minum ƿitum Ðær sum, & illi dice-
 ȝeeopðe. 7 hý Ða bant, quod ipsis om-
 cƿæþon. þ̅ him þ̅ nibus bene placue-
 licode eallum ƿel to rint ea, ut observa-
 healðenne: rentur.

Fœdus Ælfredi & Guthruni Regum.

Ðis is þ̅ ƿƿýþe Hoc est fœdus quod
 þ̅ Ælƿƿeð Lýning. Ælfredus Rex &
 7 Lýðƿun Lýning. Gythrun Rex, &
 7 ealles Angelcýn- totius Anglicæ na-
 ner ƿitan. 7 eall tionis sapientes, &
 ƿeo ðeod ðe on omnis gens quæ in
 Eaſtenȝlum beoð Anglia Orientali
 ealle ȝecƿeden hab- habitat, simul fece-
 bað. 7 mid aþum runt, & iurejuran-
 ȝeƿærtnoð. ƿon hi do confirmaverunt
 ȝýlþe. 7 ƿon heo- pro ſeipſis & pro
 ƿa ȝinȝnan. ȝe ƿon poſteris ſuiſ tam na-
 ȝebopene. ȝe ƿon tis quam nondum
 unȝebopene. ðe natis, qui Dei vel
 Goder miltre ƿec- noſtram miſericor-
 ce, oþþe une: diam curant.

Leges Eadweardi Regis.

Et infra.

Eadweard Lync. *Cum Eadweardus*
 inȝ mid his witan *Rex cum sapienti-*
 ða hi æt Exancea- *bus suis Exonia ef-*
 rtre wæron. rmea- *set, inquirebant om-*
 ðon ealle hu heopa *nes quomodo pax*
 fpyþ betere beon *eorum melior esse*
 mæhte &c. *possit, &c.*

Foedus Eadweardi & Guthruni Regum.

Ðis rýndon þa *Hæc sunt jura*
 ðomas þe Ælfred *quæ Ælfredus Rex*
 Lyncȝ 7 Lufnum & Guthrum Rex
 Lyncȝ ȝecupan: *sanciverunt. Et hoc*
 And ðis is reo ȝe- *est Senatus consul-*
 nædnýrre þe Æl- *tum, quod Ælfre-*
 fred Lyncȝ 7 Lu- *dus Rex, & Guth-*
 þnum Lyncȝ. ȝe- *run Rex, & deinde*
 Eadweard Lyncȝ. *Eadweardus Rex*
 7 Lufnum Lyncȝ & Guthrun Rex ele-
 ȝecupon. 7 ȝe- *gerunt & statue-*
 wædon. ða ða En- *runt, cum Angli &*
 gle 7 Dene to fpy- *Dani pacem & ami-*
 þe. 7 to fpeonðr- *citiam plene susce-*
 cipe fullice ren- *perunt, & sapientes*
 ȝon: 7 ða witan *etiam qui postea*
 eac ðe rýþþan wæ- *erant, sæpe & con-*
 non. *G 2 tinuo*

non. oꝛt 7 un ȝel- tinuo eadem reno-
ðan ꝥ ȝeolfe ȝeni- uaverunt & bono
ƿoðon. 7 mið ȝoðe adauxerunt.
ȝehȳhton.

Leges Æthelstani.

Æþelȝtaner Lȳ- Æthelstani Regis
nincȝer ȝepæðner. Constitutio.

Ic Æthelȝtan Ego Æthelstanus
Lȳnȝ mið ȝehea- Rex consilio Wulf-
te ƿulꝥhelmer Ar- helmi Archiepisco-
cebircop 7 eac min- pi, & aliorum etiam
na oðena Bircopa Episcoporum meo-
cȳþe ðam ȝepexan rum ꝑræcipio Præ-
to ȝehȳlcepe bȳ- positis cujuscunque
nȳȝ, &c. urbis, &c.

Et infra.

Ic Æþelȝtan Lȳnȝ Ego Æthelstanus
cȳþ. ꝥ ic hæbbe Rex declaro, quod
ȝeacꝛoð ꝥ uȳe inquisiverim, quod
ƿȳȳ ȳ ȳȳȳȳ ȝe- pax nostra ꝑejus ob-
healðen ðonne me servetur quam mihi
lȳȳte. oþþe hit æt placet, vel quam
Lȳreatanlea ȝecȳæ. Greatanleæ dictum
ðen ƿæpe. 7 mine erat. Et sapientes
ȳitan ȳecȝaþ ꝥ ic mei dicunt quod hoc
hit to lanȝe ƿor- nimis diu pertule-
bopen hæbbe. Nu rim. Nunc inveni
hæbbe ic ȝefunden cum sapientibus qui
mið Exonia

mid þæm ritum ðe *Exonia mecum e-*
æt Eaxanceap̃tpe rant ad Natale
mid me pæpon to *Christi, quod &c.*
middan rintpe. þ,
&c.

Leges Eadmundi Regis.

Eadmund Lȳning	<i>Eadmundus Rex</i>
geromnode mȳcel-	<i>congregavit mag-</i>
ne rȳnoþ to Lun-	<i>nam synodum in ci-</i>
den byriȳ. on ða	<i>uitate Londini, san-</i>
halȳan Ear̃teplicon	<i>et o Paschali tempo-</i>
tið. æȳþen ȳe ȳod-	<i>re, utriusque tam</i>
cundra hada. ȳe	<i>Ecclesiastici ordinis</i>
populðcundra: Ðær	<i>quam politici. Ibi</i>
pær Oda. ȳ pulȳ-	<i>erat Oda & Wulf-</i>
tan Æp̃cebiȳceop.	<i>stan Archiepiscopus</i>
ȳ mænȳe oðȳe	<i>& multi alii Epif-</i>
Biȳceopar. ȳmea-	<i>copi contemplantes</i>
ȳende ȳmbe heopa	<i>animæ suæ salutem,</i>
ȳapla apæð. ȳ ðara	<i>& eorum qui illis</i>
ðe him undeȳþeod-	<i>subiecti erant.</i>
de pæpon:	

Et infra.

Eadmund Lȳning	<i>Eadmundus Rex</i>
cȳþ eallum ȳolce.	<i>significo omni popu-</i>
ȳe ȳlðpum. ȳe ȳin-	<i>lo, tam senioribus</i>
ȳpum. ðe on hiȳ	<i>quam junioribus,</i>
anpealde rȳnð. þ	<i>qui in mea ditio-</i>
1c	G 3 sunt,

non. oꝛt 7 un rel- *tinuo eadem reno-*
 ðan ꝥ reolꝥe ȝeni- *vaverunt* & bono
 poðon. 7 mið ȝode *adauxerunt.*
 ȝehȳhton:

Leges Æthelstani.

Æþelȳtaner Lȳ- *Æthelstani Regis*
 nincȝer ȝeꝛæðner. *Constitutio.*

Ic Æthelȳtan *Ego Æthelstanus*
 Lȳnȝ mið ȝeheah- *Rex consilio Wulf-*
 te pulꝥhelmer Ar- *helmi Archiepisco-*
 cebȳcop 7 eac min- *pi, & aliorum etiam*
 na oðeꝛa Bȳcopa *Episcoporum meo-*
 cȳþe ðam ȝeꝛeꝛan *rum præcipio Præ-*
 to ȝehȳlcepe bȳ- *positis cujuscunque*
 riȝ, &c. *urbis, &c.*

Et infra.

Ic Æþelȳtan Lȳnȝ *Ego Æthelstanus*
 cȳþ. ꝥ ic hæbbe *Rex declaro, quod*
 ȝeacꝛoð ꝥ uꝛe *inquisiverim, quod*
 ꝥꝛȳþ iȝ ꝥȳꝛe ȝe- *pax nostra pejus ob-*
 healden ðonne me *servetur quam mihi*
 lȳꝛte. oþþe hit æt *placet, vel quam*
 Lȳneatanlea ȝeꝥꝛæ. *Greatanlea dictum*
 ðen ȳæꝛe. 7 mine *erat. Et sapientes*
 ȳitan ȝeꝥȝaþ ꝥ ic *mei dicunt quod hoc*
 hit to lanȝe ꝥoꝛ- *nimis diu pertule-*
 bopen hæbbe: Nu *rim. Nunc inveni*
 hæbbe ic ȝeꝛunden *cum sapientibus qui*
 mið *Exonia*

mið þæm ritum ðe *Exonia mecum e-*
æt Eaxancearþre *rant ad Natale*
mið me pæron to *Christi, quod &c.*
miððan rintre. þ,
&c.

Leges Eadmundi Regis.

Eadmund Lȳning	<i>Eadmundus Rex</i>
geſomnode mȳcel-	<i>congregavit mag-</i>
ne rȳnoþ to Lun-	<i>nam synodum in ci-</i>
den byriȝ. on ða	<i>uitate Londini, san-</i>
halȝan Earþerlicon	<i>cto Paſchali tempo-</i>
tið. æȝþer ȝe ȝod-	<i>re, utriusque tam</i>
cundra haða. ȝe	<i>Eccleſiaſtici ordinis</i>
populðcundra: Ðær	<i>quam politici. Ibi</i>
pær Oða. ȝ pulȝ-	<i>erat Oða & Wulf-</i>
tan Ærcebiſceop.	<i>ſtan Archiepiſcopus</i>
ȝ mænige oðre	<i>& multi alii Epif-</i>
Biſceopar.	<i>copi contemplantes</i>
ȝende ymbe heopa	<i>animæ ſuæ ſalutem,</i>
ȝapla aſæð. ȝ ðara	<i>& eorum qui illis</i>
ðe him undeſþeod-	<i>ſubjecti erant.</i>
de pæron:	

Et infra.

Eadmund Lȳning	<i>Eadmundus Rex</i>
cȳþ eallum ſolce.	<i>ſignifico omni popu-</i>
ȝe ylðrum. ȝe ȝin-	<i>lo, tam ſenioribus</i>
ȝrum. ðe on hiȝ	<i>quam junioribus,</i>
anpealðe rȳnð. þ	<i>qui in mea ditione</i>
1c	G 3 ſunt,

ic ſmeaðe mið min- *sunt, me contempla-*
 na pītena ȝeþeahhte *tum eſſe cum ſapien-*
 ȝeȝoðna haða ȝe *tum meorum conſilio*
 læpeðna. &c. *tam Eccleſiaſtici or-*
dinis quam Laici,
&c.

Leges Eadgari Regis.

Dīſ iſ ſeo ȝeſnæð- *Hoc eſt inſtitutum,*
 nýſſe. ðe Eaðȝar *quod Eadgarus cum*
 Lýnȝ mið hīſ pī- *ſapientum ſuorum*
 tena ȝeþeahhte ȝe- *conſilio inſtituit in*
 næð. Loð to lofe. *gloriam Dei, & ſibi*
 ȝ him ſýlfum to *ipſi in dignitatem*
 cýnercipe. ȝeallum *Regiam, & in uti-*
 hīſ leoðſcip to *litatem omni populo*
 ðearf. *ſuo.*

Leges Æthelredi Regis

Dīſ iſ ða ȝeſnæð- *Hoc eſt conſilium*
 nýſſe. ðe Æþelſeð *quod Æthelredus*
 Lýning ȝ hīſ pītan *Rex, & ſapientes*
 ȝeſnæðdon. eallum *ejus conſultaverunt*
 folc to fſiþerbote. *ad emendationem*
 æt pudeſtoce on *pacis omni populo*
 Mýncena land æf- *Wodſtoci in regione*
 ter Ænȝla laȝe. *Merciorum, ſecun-*
dum Angliæ leges.

Senatus

Senatus consultum de Monticolis Walliæ.

Ðiſ iſ ƿeo Ʒe- *Hoc est Concilium*
 ƿæðnyſſe ðe An- *quod Angliæ nati-*
 Ʒelcýnneſ ƿitan. *nes sapientes &*
 7 ƿealhƿeode ƿæð- *Walliæ Consilarii*
 boƿan betƿox De- *inter Monticolas*
 unſetan Ʒeſetton: *constituerunt.*

Leges Cnuti Regis.

Ðiſ iſ ƿeo Ʒe- *Hoc est Consilium*
 ƿæðneſ. ðe Cnut *quod Cnutus Rex,*
 Lýning ealler En- *totius Angliæ &*
 Ʒla landeſ Lýnin- *Danorum & Nor-*
 Ʒe. 7 Dena Lýning. *wegorum Rex, cum*
 7 NoſþriƷen Lýn- *sapientum suorum*
 ing. mið hiſ ƿite- *consilio sancivit, in*
 na ƷeþeahƷe Ʒeƿeð. *laudem Dei, & sibi*
 Lode to loſe 7 him *ipsi in ornamentum*
 ƿýlƷum to cýneſ- *Regium, & ad uti-*
 cippe. 7 ƿolc to *litatem Populi; &*
 ðearƿe: 7 þ ƿæſ *hoc erat sacris Na-*
 on ðæm halƷan *talibus Domini no-*
 miðƿintſeſ ƿide *stri Wintoniæ.*
 on ƿintanceaſƿe:

The next and last thing I shall men- *Of the La-*
 tion before I draw any Conclusion from *tin name*
 what has been offer'd to the Reader, *of the Sax-*
 are the Terms used by our *Latin* Histo- *on Legisla-*
 G 4 rians, *ture.*

rians, to denote both the *Saxon* Parliaments, and the Persons that composed them. The first is generally expressed by *Conventus Sapientum*, which is but a meer Translation of the *Saxon* words, the Members it consisted of, are denominated *Principes*, (of which enough has been already said) *Proceres*, *Primates* and *Nobiles*, all which Words, however they may seem in the vulgar Acceptation to exclude the Commons, yet on a strict Examination, the contrary will appear a most manifest Truth. For,

The meaning of the words Primary, Primates, and Proceres.

1. The words *Primarii*, *Primates* and *Proceres*, are all render'd by the *Saxon Glossarist*, *Teldest*, *Burgh wara*, these in our modern *English* we call *Port-Reve*, *Bursholder* and *Headborough*, in some Places by a more common expression borrowed from the *Norman* Dialect, *Mayors*; and in this Sense is the word *Proceres* used by the Writers of other Countries as well as our own; for *Dufresne* says it denotes the Chief Magistrates in Cities ^a.

The meaning of the word Nobles.

2. That in *England*, the words *Nobiles* and *Nobilitas* were used to signify *Knights*, (that they were Commoners in the present Sense of the Word is agreed)

^a *Dufresne* in hac voce.

seems

seems clear, because *Knight* was a Name of Dignity ; they are in old Authors styled Honourable ; in a Record 9 *Ed.* 1. a Knight has the addition of *Nobilis* : And Lord^b *Coke* says, *Nobiles sunt qui Arma Gentilitia Antecessorum suorum proferre possunt.*

From these Premises I conclude,

1. That the Legislative Power was not solely in the *Saxon* Kings. This is The Legislative Power not vested solely in the King. not only evident from what has been already said, but also from what we read in two of our Law Books, *viz.* That their Kings were originally vested with that Office by Election, and sworn to be Obedient to, and suffer the Law as other their associate Leaders, whom one of my Authors calls the Kings Companions. The other, writing in the Phrase and Terms used in the *Latin* of his Time, says, That the Kings Courts, which consisted of the Earls and Barons, and the Law, were both superior to the King : But this Point need not be labour'd ; for the very learned Advocate for Slavery, Dr. *Brady*, does not assert a Legislative Power solely in the King, but in the King and Nobility, exclusive of the Commoners.

^b Instit. 594 & 595. Camb. Brittan. 243.

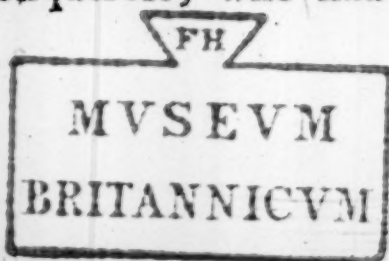
Originally
in all the
Landhol-
ders.

2. From the entrance of the *Saxons*, for some Time, they all personally assisted at the *Saxon* Parliaments. I don't mean every individual Person that resided in the Kingdom, but every one of those to whom the Land was apportioned; for example, in *Kent*, where *Hengist* the first *Saxon* King settled himself, it seems all the Landholders met to assent or dissent to the making Laws. Tho' this Supposition seems clear from the first Proposition we laid down above, yet for the better evincing an *Hypothesis* so different from the Usages of our present Time, I would further offer to the Reader's Consideration the following Observations.

Proofs of
this.

1. Our *Saxon* Ancestors, in their own Country, did all personally meet for the enacting Laws in the manner we have related above; and every Circumstance of the Time consider'd, it cannot well be doubted, but that they did here as their kindred Nations did elsewhere Practise at first, and for some time retain the Usages they were bred in and accustomed to in their native Country.

2. That by the Feudal Law, in its primitive Institution, all Landholders were obliged to attend at the Feudal Courts; because all the Land was parted amongst the Conquerors, who had a Right to give



give their Assent or Dissent to any Laws or Orders there proposed ; whence we yet retain the Expression of a Convention of the Estates.

3. Why might not all the Landholders in *Kent*, when that Province was styled a Kingdom, as well meet on so great so important an Occasion as the making of Laws or giving Judgments as they did afterwards, when it became an Earldom ; and yet in strictness are obliged and by intendment of Law all do meet at the Sheriffs Turn and County Court for Business of a like but inferior Nature.

4. These Meetings were in open Places, which were capable of receiving a much greater number of People than came to them, because, as has been already observed, there were no minute Freeholders in those early Days.

5. That the Land being divided amongst the Conquerors, who were antecedent to their Conquest, a voluntary Society, no Person that was not a Member of it, and consequently had not Land, could have any Voice in imposing the Laws on them who were the absolute Proprietors of the Soyle ; therefore the *Caorl* or Husbandman was no Member of the *Witena Gemot*.

6. Every

6. Every *Thane* being Tenant by Serjeanty, which was, as is already observed, only possessing Lands in recompence for his Service, and in lieu of Wages, he was no more than part of the Family of one that was a Member, or succeeded to one that was a Part of that Voluntary Society which first conquer'd the Kingdom, and therefore could have no Voice in the imposing Laws on a Society, of which he was no Member, but only a Servant to one who was.

*After-
wards of
the Chiefs
or Magi-
strates in
every Ty-
thing.*

Tho' the Individuals ever retain'd their native Right of being govern'd by Laws made by themselves, yet when the Exercise of the Legislative Power, in the Person of every single Body natural, from their Remoteness and Number, became impossible, some Change was necessary in the Exterior Forms and Appearances in order to preserve a Common-wealth on the same Principles 'twas first form'd and established; and as the whole Kingdom was divided into several little Associations, as I apprehend, some Person out of every Tything or Burrough, the Reader will recollect, that 'tis already proved they were co-significant Terms, came to the *Witena Gemot* to take care of the Concerns and Interest of the Society to which he belong'd. For,

I. The

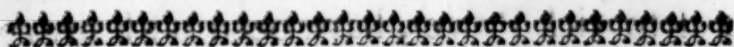
1. The Assembly of the *Saxon* Legislature, when they consisted of a select Sett of Persons, were called *Witena Gemot*, or, an Assembly of wise Men; whence we seem to have derived the now well known Expression of the Wisdom of the Nation to denominate the Parliament.

2. It is certain from the Title of the *Saxon* Laws, that the Earls, Bishops and Abbots were Members of the *Witena Gemot*, or *Saxon* Parliaments, and also others denoted in the *Saxon* Language by the Word *Wita*; that the Earls, Bishops and Abbots were the presiding Judges in the several Communities both Ecclesiastical and Civil that the People were originally distributed into, is not doubted, and that by the Word *Wita* we are to understand the presiding Judges of the Communities they were afterwards divided into, is, I think, already proved; whence, it seems, we may conclude, that the *Saxon Witena Gemot* consisted of the Persons who presided in each Community, and 'twas but a natural Devolution when the Exercise of the Legislative Power became impracticable in the Person of every Individual, that it should vest in every Body Politick, and that the Person to whom each Community had by their own free Choice given
the

the Precedency amongst themselves, should be the Delegate, or, as we now phrase it, the Representative of the Rest. Hence, I think, 'tis clear, that the Commons, as now understood, were ever Part of the Legislature; because, though perhaps the Earls might not be Elective, or annual Officers, after the Dissolution of the Heptarchy, as they were before, yet after its Dissolution the *Graves* of the Hundreds or Tythings, who were Elective, being Members of the *Saxon Witena Gemot*, the Commons remain'd a Constituent Part of the *Saxon* Legislature.

Tho' the Propositions here advanced are only supported by Facts that occur in the Monuments of the *Saxon* Times, yet many Usages whose Origin we know not, but meet with subsequent to the *Norman* Conquest, might be offer'd to the Reader; some of which being palpably derived, and others being conformable to, or connected with what has been already advanced, would both illustrate and confirm the Hypothesis that is here offer'd to his Consideration; but as the Constitution of the Legislature in that Period of Time, will be the Subject of the ensuing Chapter, the Reader will find them there, and, I hope, particu-

particularly observe, how well the Hypotheses we propose of both Times, suit and tally with one another, that being the strongest Proof that can possibly be produced of the Truth of both.



C H A P. III.

Of the Parliaments after the Conquest.

IN the Period of Time, which by the Course of this Essay is to be the subject of this Chapter, our enquiry into the Constitution of the Legislature would be most idle and vain, if the Doctrine of those Authors who assert an absolute Right of Conquest in *William I.* is not first confuted. The Arguments that have been offered by those who have endeavoured to debase our Constitution, and sink us even lower than the brutal Part of the Creation, (for to reduce reasonable Creatures to Slavery, it being contrary to their Nature, is doing so, and loading them with an intolerable Burthen) have, many of them, been fully answered by their Antagonists: Nor is it my purpose

*Of the
Conque-
rors Pa-
wer.*

How that
is to be
judged of.

purpose to transcribe any thing they have offer'd. Facts from History and Records are fully produced in their Works; but if I may be allow'd to use a Logical Distinction, I would observe, that though the Arguments *a Posteriori*, which prove *William I.* did not exercise a despotick Power, have been with great Diligence and Reading put together; yet the Arguments *a Priori*, which prove he had no right to such Power, have passed with little Regard or Notice, tho' in my Apprehension the clearest and most cogent: For the Question is not whether *William* the Conqueror did do arbitrary Acts; but whether he had a Right to do them? therefore to decide the present Question, we are not to seek for Instances, or reason from any Acts of Power he exercised, but to see whether he had any, and what right to such Power; and if it can be proved he had none, those Instances may be allow'd to prove him a Tyrant, but not that Position they are used to maintain; and therefore notwithstanding such instances the Right of the People subsisted, and however invaded by him, might lawfully be recovered, and exercised whenever they could find means to get the Power of so doing; for no Prescription can be from illegal Acts, or against Liberty.

berty. For the clearing this Point, I will first state from *Grotius* and *Puffendorf*, when any, and what Right is acquired by War. 2dly, I shall shew that according to the Rules laid down by those admirable Authors, the Conqueror (to speak in the vulgar Phrase) had no Right by Conquest over the generality of the *English* Nation. 3dly, Since, subsequent to the *Norman* Invasion, we were in some, though in a much less degree, than is generally supposed, a mixed People, and a late Author has thought fit to call the Successors of the *Norman* Chiefs, who assisted the Conqueror in his Expedition, (on a previous Promise of partaking what was got) for asserting their Rights, *incorrigible Rebels*^c: That the Conqueror neither before nor after the acquiring this Kingdom had any absolute Power over them, even no more than the Emperor has over the Sovereign Princes in *Germany*.

Nations, who have no common Superior, being in a state of Nature, when they have any Difference that they cannot settle in an amicable Way, have usually recourse to Force, which like our disputed Tryal by Battle amongst private Per-

*The cause
of Wars.*

^c *Brady* in his Preface to his History.

*When and
what Right
acquired
by Con-
quest.*

sons, (originally practised where the common Superior, by reason of want of Evidence, would not determine, so left them, as to that Controversy, in a perfect state of Nature) is an appeal to the great Superior of Mankind, and maker of the World, to determine the Right: And as Providence (whose Ways are unsearchable) suffers sometimes the Unjust to prevail, this last Method is not to be taken without just Cause, that is, unless an Injury be done, and all peaceful Applications prove vain: So in every War one Party is most certainly a Wrong-doer. Now according to the Justness of the Cause do the Rules of the Law of Nature and Nations determine the Right of the Victor: For if he had not Justice of his side, when he began the War, or prosecuted it after tender of amends, he is a Wrong-doer, and acquires no new Right by Success, but thereby not only gives all Mankind a Right, but even makes it their Duty, to restrain him. But if the Cause of War be just, though the Victor obtains a new Right, yet the Extent of this is not, I think, well settled; that which is beyond all doubt is, that in Justice he may take full Satisfaction for the Injury done by him that occasioned the War, and for every individual Hurt or Inconvenience that flow-

ed naturally or casually from it, and we may go so far as to say, that some Punishment may be justly inflicted on the Wrong-doer; but to say as some do, that an absolute Property in the Lives and Fortunes of the vanquish'd is, by Success, vested in the Conqueror, is a Doctrine, as I conceive, inconsistent with Humanity and Reason: But we need not here discuss that Point, because if that cruel Position were true, yet it cannot be applied to the Case in Question. For,

1. The *Normans* and *English* had no sort of difference, but had lived not only in a peaceable, but even a friendly Manner, with so frequent, so familiar an Intercourse, that 'tis suppos'd (they being, long after our *Saxon* Ancestors come from an unpolish'd Part of the Globe) our *Edward* the Confessor directed them in the forming, or polishing their Laws and from them learn'd and introduced into this Isle the manner of sealing Deeds, which yet continues amongst us.

The Normans and English, Friends.

2. The *Norman* Duke's pretence of coming, was a suppos'd Title; therefore as War was not waged against the People but the Person in Possession, consequently against *Harold* only, a late learn-

The Conqueror claimed by Title.

ed Author ^f had reason to say that the Conquest that was made was made over *Harold*, and not the Nation: And the Conqueror himself understood the Quarrel to be so, and therefore offer'd to decide it by single Combates.

3. *William* Duke of *Normandy* when he came into *England* seem'd to have consider'd War in the same light as 'tis stated above, *viz.* of an Appeal to the supreme Judge, and to have claim'd this Kingdom as his Right by Inheritance, or Donation: That his Pretences to it by either or both these Ways were ill grounded is most certain, but that the same were then dubious is not less so; and considering the Rudeness of that and the succeeding Ages, 'tis no wonder this was so little understood; however the Crown he claim'd as legally due to him: Now whether we take the *Norman* Duke's Title by Blood or Donation, clear it is that he could have no more extensive Power over those who did not make themselves Wrong-doers by opposing him, (supposing that could make them so;) than the Person he claim'd under had, and what that was is sufficiently explain'd in the preceding Chapter.

^f *Hale's* History of the Law.

^g *Brady* and *Tyrrell's* History in the Life of *Harold*.

As the Conqueror's getting the *Diadem* of this Realm gave him no Right to despotick Power over the *Saxons*, so neither had he any over his own victorious Army. To state this matter fully we must take a short View of the *Norman Settlement in France*.

The Conqueror not absolute over the Normans.

Rollo, Duke *William's* Ancestor, was the Leader of a Confederate Army consisting of *Danes*, *Norwegians* and *Sweeds*, (for all these People are denoted in Historians by the general Name of *Normans*.) He himself was a *Dane*; and as these People were not born subject to one Prince, consequently *Rollo* could have no pretence, much less a Right, to any Power over at least two parts of them, but what was derived from their own free consent. They conquer'd *Neustria*, and from themselves call'd it *Normandy*.

Of the Norman settlement in France.

The Land was divided amongst the Conquerors, and Laws enacted for the well ordering their new State, by the consent of the other^h Chiefs and Superiors, and not by *Rollo's* own single Power. *Rollo's* legitimate Line failing in Duke *William's* Father, he by consent of the

^g Grotii proleg. ad Hist. Got. 11. &c. Mezeray ad Annum, 889.

^h Benage Coutume de Normand. p. 2. &c.

The Con-
querors
Army
how com-
pos'd.

Barons was elected to succeed him, and consequently could have no Right either to the Dukedom, or any Power but what was voluntarily confer'd on him: As all his Subjects were so by their Feudal Tenures (the Extent of that Power is stated above;) were there no other Evidence that the Conqueror's Army was compos'd of an Association entred into by the free Will of the united Leaders, it ought to be believed; but we have an expresse Testimony of this Fact; for we read, That when Duke *William* desired a Supply of the *Norman* Barons for asserting his Claim to the Crown of *England*, they told him, " That the "*Normans* were not bound by their "*Allegiance* to serve in foreign Wars, "*and* no Considerations could bring "*them* to raise a Supply, though *Wil-* "*liam Fitzosbert*, a Man generally be- "*lov'd*, both by Duke and People, pro- "*moted* it with the utmost Zeal, and "*to* encourage others, engaged to build "*forty* Ships at his own Charge for the "*Service* of the War.

" The Duke finding himself disap- "*pointed* in this publick Way, tries other "*Methods*, and sending for the Weal- "*thiest* of them One by One, speaks "*them* fair, and desires that each would "*contribute* something towards the War.

" This

“ This drove them to a sort of Emula-
 “ tion who should be most zealous in
 “ the Assistance of his Prince, and made
 “ them promise largely, and an Account
 “ being taken of the Contributions, a
 “ Sum beyond expectation was raised in
 “ an Instant : Matters being carried thus
 “ far, he solicits his neighbouring Princes
 “ for Aid, the Earls of *Anjou, Poictu,*
 “ *Mayne* and *Bulloigne*, upon this En-
 “ couragement, that they should have a
 “ Share of the Lands in *England* ⁱ. ”

Thus one Author, in an undeter-
 mined manner, represents the *Norman*
 Barons voluntarily aiding Duke *Willi-*
am ; but from another we learn they did
 not all do it, for one of the principal *Nor-*
mans, notwithstanding all the Duke's
 plain and artful Methods, persisted in
 his Refusal, and gave much better and
 honefter Reasons for so doing than the
 other could for asking it ^k. From these
 Authors it seems clear, especially if the
 Conqueror's Army were not paid, and
 that they were not is highly probable,
 that he and his associated Chiefs were,
 if I may use the Expression, Partners in
 the Profit and Loss of his Expedition :
 That this was the Sense of his Compa-

ⁱ Camb. Brittan. 211. vide the Anon. History at
 the End of *Tayler of Gavelkind*, &c.

^k *Daniel* 34 & 68.

nions, and their Posterity, is certain; nor is it less so that this was not gainsaid by his Successors; for Earl *Warren* when his Title to the immense Estate that was given to his Ancestors by the Conqueror was questioned, and that too by one of the most powerful Kings that ever filled the *English* Throne, produced an old Sword, and unsheathing it said, Behold, my Lords, here is my Warrant, my Ancestors coming into this Land with *William* the Bastard, did obtain their Lands by the Sword, and I am resolved with the Sword to defend them against whomsoever shall endeavour to dispossess me; for that King did not himself conquer the Land and subdue it, but our Progenitors were Sharers and Assistants therein¹. That the Conqueror had no despotick Power over his Army when he landed, may be inferr'd from what's already said; that the Acquisition of this Kingdom by their means could give him none is obvious, as it seems clear, that they would not have been content in return for the gaining a Victory for their General at the hazard of their Lives, to be debased from Freedom to Slavery; that is, from the most happy and glorious State

¹ *Blunt's Tenures*, p. 9. *Tyrrill's Hist.* to 3 Vol. p. 30.

of human Nature, to the most vile and abject, I would say miserable too, if People who can prefer Life with Bondage to Death, could merit any degree of Compassion.

Before I cloſe this Enquiry into the Extent of the Conqueror's lawful and right-ful Power, I ſhall answer two Arguments that have been uſed to aſſert his Title to arbitrary Dominion, though one of them from its own Weight merits no Conſideration; yet being urged by ſo great a Man as *Salmaſius*, and not ſo fully answer'd by *Milton* as it ought, muſt not paſs un-noted; the Argument I mean is the uſual addition of *Dei Gratia* to the Titles of our Kings. See then its Origin as it's related by a Monk and a *Frenchman*, Circumſtances that will clear the Author from any imputation of Partiality to the Liberty of Mankind; the Perſon I mean is the learned and honeſt Father *Mabillion*ⁿ, who tells us, That the firſt King of *France*, (and he was the firſt Prince in *Europe* alſo) that uſed that Title, was *Pepin*, and that he aſſumed it becauſe he came to the Crown by extraordinary Means: Now the Truth is, *Pepin* uſurped the Crown of *France*, and had no other Title but Force. Such was the firſt King who ſo ſtyled himſelf, and ſuch was the Motive

Two Ob-
jections
answer'd.

Of the Title
Dei
Gratia.

ⁿ De re diplomatica.

to it; since that Time it has been the Addition of the Dukes of *Venice*: ° *Lanfranc*, Archbishop of *Canterbury* in the Conqueror's Time, used this Addition in writing of himself, and others did it when they addressed themselves to him; in King *Stephen*, or *Henry II*'s Time the Bishop of *Winchester* so styled himself: And even since the Restoration in the Writ by which that truly great and good Man Dr. *Juxon* (who after having filled the highest Station in the State with singular Reputation had been advanced to the See of *Canterbury*) is summoned to Parliament, he's styled *Dei Gratia Archiepiscopus Cantuariensis* P.

The Con-
queror's
Govern-
ment not
a military
one.

The other Argument is indeed more specious, but on due Consideration 'twill be found as inconclusive; 'tis this, On the Conquest (say the Patrons of Tyranny) the Government was a sort of military Government, the military Tenants composed, and were in effect a Standing Army. Though the general Observations which were made in the first Chapter on all the *European* Governments, which need not be here repeated, seem sufficient to answer this; yet, for the clearing so material a Point, let it be further observed how many of the Individuals that composed the Army were immediately under the Conqueror's

• Eadmerus, p. 12 & 36. *Madox* Formulæ in the Specimen of Hands.

¶ *Petty* Of Parliaments, p. 182.

Command;

Command; and 'twill be found, that not one in fifteen, if I said, not one in thirty were so, I believe I should not exceed: Again, every one of the military Tenants were the Proprietors of much the major Part of the whole Kingdom, and attended in the Army to perform their military Service, by Virtue of their Knights Fees; now every Knight's Fee, at the lowest Estimation, is supposed to be 20*l.* *per Annum*ⁿ; that Sum two Hundred Years ago, as has been prov'd by the late Lord Bishop of *Ely*, was equivalent to 140*l.* To enter into all the Proofs that might be given, of its Proportion to much greater Sums in the Conqueror's Time, would be deviating too far from our present Purpose, and is the less necessary, because none but an utter Stranger to the Antiquities of his own Country, and indeed to those of others, can doubt that 20*l.* at the Conquest was equivalent to 300*l.* nay, I truly believe 500*l.* *per Annum*, that is, the Land that would then yield but 20*l.* would now produce the other greater Sum, and 20*l.* would then purchase as much Corn, or other Necessaries of Life, as the biggest of the other

ⁿ 2 Instit. 596, Stat. de Militibus, *Camb. Brit.* 256, &c.

Sums would now : View then the Conqueror in his military Capacity, and at the Head of his Army, or to speak properly, of the Militia, and the Proportion betwixt the Number of his Vassals, and those of the Peers consider'd, he will appear no more absolute over the Peers in the Field than in the Palace : Again, consider, that these military Persons were Gentlemen of great Estates, such at least, as are at present deem'd a sufficient Qualification to serve in Parliament for any City or Borough : Now these undeniable Truths are put together, can the most bigotted Patron of Arbitrary Power believe such an Army would be the wretched, and abject Instruments of the Conqueror's Tyranny, and their Oppression ?

From stating what Power the Conqueror could legally exercise, 'tis a natural Transition to enquire into what he did exert, by which a Scene very different from what some may imagine would be disclosed ; but the Consideration thereof in this Place must be determined by the Subject of this Essay, and therefore the Members of the Legislature being so by Virtue of their Tenures, our present Discourse of the Conqueror's Actions must be restrained to this Point.

The

The *Saxons* and *Normans* used very different Means in their Settlements, the former destroy'd the People, and possessed themselves of the whole Land; the latter had no such Design, nor indeed Power sufficient to execute it: And as the Conqueror himself only claimed Power, and that too by Title, his Confederates had the like Views; so all these Invaders purposed the ruling, and not destroying the former Inhabitants: The Conqueror assumed the regal State as his own by Right, and the Demesnes of the Crown as thereunto annexed; having seized both, he treated all the *English* that opposed his Accession to the Crown as Rebels, and dispossessed them of their Lands which were distributed amongst his own Confederates, with this remarkable Difference from what was done by the *Saxons*, that these extirpating the *Britains*, gave their Chiefs, for himself and his Followers, one entire District, whereas no Persons on the Conquest being dispossessed, but such who, by their opposing the Conqueror, and according to the known Rules of the Feudal Law, supposing the so doing was unlawful, forfeited their antient Right, in consequence thereof most of the Conqueror's confederated Chiefs had Lands assigned them, that

How the
Saxon
and Nor-
man Set-
tlement
differ'd.

were

were oft not only disjoin'd from one another, but also sometimes in different Counties of the Realm. The neutral *English*, though they fared better, yet did they also in some Degree feel the Effect of the *Normans* Love of Power. In the Rural Tythings (so for want of a better Word, I take the Liberty to term those that did not consist of trading Persons, as I shall hereafter these trading ones) were placed *Norman* Chiefs, and for ought I can find, every *Norman* so constituted Chief of the Rural Tythings, as he succeeded to the *Saxon Gerefa's*, he did also possess the same, and no greater Preheminence than they did; save only that this Superiority was first in them made hereditary: For, had it continued, as in the *Saxon* Times elective, the Bulk of the Electors being *Saxons*, no *Norman* could have been preferred: These Chiefs, by *Norman* Appellations, were called Barons and Seigneurs, more contractedly, Sires, and their Estates Baronies, or Honours. That an Honour consists of many Manors, even in the present Sense is agreed, tho' of what Number none have conjectur'd, much less defin'd. If what has been offer'd concerning these Tythings is received for Truth, we may determine it to have consisted of at least ten
Manors,

Origin of
Barons
and Seignories,
and Honours.

Manors, because every Tything consisted of so many; and every Tything, when the Superiority became hereditary, constituted one Barony, or Honour. The trading Tythings generally continued in the same State they were in before, which I do not attribute to any peculiar Kindness the *Normans* had to them, but rather, to the Contempt a rough and martial People had of manual Occupations, and all Things out of the Compass of their own Knowledge: Whatever was the Cause, sure it is, that generally, if not universally, they were left in their original State, and remain'd so, many little Common-wealths retaining, as some yet do the *Saxon* Officers, with their *Saxon* Names, Courts, and even the *Saxon* Denominations of Boroughs, to distinguish themselves by. Thus did the original Equality, so conspicuous in the *Saxon* Establishment, which before the Conquest was universally diffused thro' the whole Kingdom, become confined to the Boroughs where it yet subsists.

The Trading Partition left their former State

The Conqueror's Title being disputed, Prudence induced him and his Confederates to have an Eye to the securing their new Acquests; and the Regulation of Tenures in *Normandy* and *France*, whence they came, naturally determin'd them to the reducing this Kingdom, to

The Establishment of Military Tenures.

as

as great a Conformity as they could to the Usages of those Countries : Hence arose the regulating what Number of Soldiers the *Norman* Chiefs, or the old *English* that were continued in their Possessions, or advanced to Power, should bring into Field ; and also the subjecting the Ecclesiasticks themselves to the like Duty. Thus were all the single immediate Tenants of the Crown, one only excepted, bound to do military Service, in case of an Invasion or Rebellion; the trading ones, where the whole Community held of the Crown, being by the Occupation of their Members unapt for Arms, and qualified to contribute in their Purses were at the same Time (if I guess rightly) obliged to pay a certain annual Sum towards the Support of the Government, which I conceive to be the same we read of soon after the Conquest, under the Appellation of a Fee-farm Rent.

Of Grand Serjeanty. Besides these Tenures visibly founded on the *Saxon* Constitution, there was one which, in Deference to the Sense of others, rather than for want of Footsteps of it in the *Saxon* Times, I omitted to mention before ; the Tenure I mean is Grand Serjeanty, for Petit is not here consider'd, because, however, the Lord *Coke's* Division of Serjeanty may

may be applicable to our Law, as understood when he wrote; yet surely 'twas otherwise in the Time we now discourse of: I take the Thing then to have stood thus; where the Service was of a publick Nature, 'twas, I conceive, called Grand Serjeanty, where of a private Nature, Petit Serjeanty: Thus, if Land were given for the Service of Steward, Constable, Chamberlain, or Marshal of *England*, such Gift and Service created a Grand Serjeanty; but if for Service of Steward of the Household, Master of the Horse, or Chamberlain of the Household, these respecting only the Person of the King, and not the Publick; such Services as they created no Tenure of the Publick, so did they, as I conceive, make only a Tenure by Petit Serjeanty.

The Army the Conqueror brought with him was too weak to keep the *English* in an unwilling Obedience, and yet much less able to do so, when many of them returned a Year after the Invasion to their native *France*; hence the Conqueror probably sensible, that it could not be the Interest of the Minority to keep up Distinctions, acted on a View of consolidating both the *English* and *French* into one People, and for this Purpose introduced here Wardships

*Earls left
as before,
to preside
in the
County.*

ships and Marriages. On the same Motive 'tis highly probable, he did not subvert, or dissolve the *Saxon* Government, but adapted the Rewards of his Fellow-Adventurers to their Constitution, and left the *Saxon* Earls, as in their Institution officary, and the Counties under their Administration; but undermined the Power he could not safely destroy, by dismembring the Barons Estates in a manner from the Counties, and making them recognise no Superiour but the Crown.

*Distribu-
tion of the
forfeited
Land un-
der vari-
ous Reser-
vations.*

The Conqueror gave Part of the Land that he retain'd to himself, under the Reservation of military Service, to his own immediate Followers; so did his Confederates, who, holding their Lands by the Service of a determined Number of Soldiers, enfeoffed their own immediate Followers with some Portions of what was assigned to them for their Share, under Reservation of such Service. These Lands so given were called Knights Fees, and 'tis highly probable, that the Conqueror and his Associates did compel many of the old *English* to hold their antient Possessions by the same Tenure, the Number of them exceeding sixty Thousand. As they all agreed in the creating Knights Fees, so did they in one uniform manner divide,

or which I think more probable, continue the Division of the Residue of their Possessions in the same manner as the *Saxons* had used; some Part they retain'd in their own Hands, other Part was allotted to Husbandmen, in lieu of Hire, for as narrow as their Commerce was, they had not Money enough to answer its Occasions. These were to till and manure such Portions as they retain'd in their own Hands, and were called Tenants in Soccage; a Word which signifies the Service of the Plough, and properly were they so termed, since 'till *Henry* the II^d'sⁿ time they actually performed that Service; then indeed Money became more plentiful: And as the Reason for the Institution of that Service was thereby gone, the Service itself vanished, and in lieu of it those Tenants have ever since paid a Rent; the Residue was either left to the Occupation of the Bondmen, or lying neglected, was called the Waste*.

All the forementioned Tenures subsisted 'till the twelfth Year of King *Charles* II^d. at which time the military Tenures were abolished; the Soccage

ⁿ *Hale* of Sheriffs Accounts. p. 14.

* *Baton's* Elements of the Law, 30.

Tenure yet subsists, and so does the Bondmens, whose Successors are the Copy-holders: And though Time has dealt very favourably with them in all other Respects, they yet retain one Mark of their original Servitude; for as of old, Bondmen were not reckoned Members of the Common-wealth, but Part and Parcel of their Owners Substance, so were they therefore originally excluded from any Share in the Legislature, and their Successors still continue without any Right, to vote at Elections, by Virtue of their Copy-holds.

*Two Sorts
of Tenants
in chief.*

From this Account of Tenures 'tis obvious that the Conqueror, to speak in the vulgar Phrase, had two Sorts of immediate Tenants, *viz.* those that held of him as chief of some Seignory, who were his particular Followers at the time of his Invasion; the Service of those was annex'd, or, as we phrase it in the Law, Regardant to some particular Seignory, and passed at least laterly by the Grant thereof to any Subject; the other Sort of Tenants are those who held of him as Chief of the great Seignory of the Kingdom, and had confederated with him, as related above, and had Followers of their own; the Service of these was not transferrable †: Of these, only I desire

† *Dyer*, 40.

the Reader to understand what will be hereafter said concerning Tenants in chief, or Tenants of the Crown.

Thus in this well digested Form of Government, by a Disposition concerted with equal Wisdom and Justice, all did in Person or in Purse, by a stated and known Rule, and determined Proportion, contribute towards the necessary and only Ends of all Governments, the Preservation of the Community ; I say, by a determined Proportion, because this seems certain by what is already advanced, and might be further evinced by an infinite Number of Arguments; one only shall be here insisted on, which is this, on the Distribution of the Land, certain Services were stipulated to be perform'd in Lieu and Recompence, or Return for it^o: Now, if Lord, or King, could demand more, or had a despotick Power over their Vassals, such Stipulations were vain and ridiculous; for why should a Superior say to his Vassals, You shall for this Land do me this, or that Service, or else I'll have a Right to turn you out; if the Superior had an absolute Power to command the Vassal to do that, and every other Particular, which Pride and ill Nature rioting in

The Necessity of providing for contingent Events.

• Vide Strykii Jus Feudale, 309.

absolute Power might prompt him to require ?

Under these Regulations were the ordinary Charges incident to the publick Service adequately provided for. But as no human Prudence can foresee all future Occasions, and the Duties of all Persons were by feudal Contracts regulated; and Contracts once made cannot be dissolved or changed, but by the Consent of all Persons who were interested in them; therefore 'twas as necessary under the *Norman*, as before in the *Saxon* Establishment, that the Consent of the People should be obtained for such further Provision as any Emergency might render convenient or necessary. All Writers and Parties are, I think, agreed, this was done by a Convention or Assembly of the Barons, however widely they differ in determining who were so at the time we now treat of; 'tis therefore incumbent on me to fix this, for which Purpose I will shew the Etymology of the Word, and its Notation from Records, and other antient Monuments.

*This Power
was vested
in the Barons.*

Authors differ exceedingly as to the Etymology of the Word Baron; their Opinions the curious may see in the Books referr'd to in the Margin *p*; that

p *Spelm. & Dufresne* in voce Baro. *Hicks* dissert. Epif-

which

which I conceive to be the best is here offer'd to the Reader's Consideration.

The old *Teutonick* Word *Bar* that Etymology of the Word Baron. signify'd Man, and in its more restrain'd Sense a Freeman, was carry'd by the *Germans* into all their Conquests, tho' sound'd and spelt with some Diversity; in *Spain* they wrote it *Var*, and now *Varo*, our *Saxons* *War*, the *Normans* and *French*, *Bar* and *Baro* ^r.

This Word does not occur in the *Longobardick* System of the feudal Law, nor, if I have observed rightly, in any Writers older than some of the Laws publish'd in *Lindenburg's* Collection ^s, in which it signifies no more than a Man or Freeman; nor is it to be found in any of our Monuments older than the Conquest, except one of *Edward* the Confessor ^r, whence he having been so conversant with the *Norman*; and from its frequently occurring in the Customary of *Normandy* ^v, I'm now perswaded, notwithstanding what I've somewhere wrote

tolar. 146. 4 Instit. 45 & 46. *Dodridge* of Nobility, 54. *Cambd.* Brit. 238. *Petit* 108. Arg. *Antino.* 20. *Madox's* History of the Exchequer, 134. *Formulare* 2 & 128. *Brady* of Boroughs, 26. *Coke* on *Littleton*, 111, &c.

^r *Hicks* Gram. Theotes.

^s Leg. *Aleman.* 76. *Lex Ripuar.* Tit. 58.

^t *Somner* of Gavelkind, 207.

^v Edit. per *Benage*, 281, &c.

in the disjunctive, as if 'twere dubious, whether this Word was introduced into this Kingdom by the *Normans*, or the *Danes*; that 'twas derived to us from a *Norman* Original, and became more common in this Kingdom by, and at, or soon after the Conquest: But I incline to think, its Establishment owing chiefly to the Use of the *Latin* Tongue in our publick Acts, rather than to that of the *Norman French*, since the antient Barons affected the Appellation of Sire, not that of Baron^w; and even at this Day, in the Writs of Summons to Parliament the Barons are so stiled. After the transplanting this Word into *England* we find its Signification varied; at the time of the Conquest, it signified the immediate Tenants of the Territories of that Seigniorie that were the Subject of the Discourse; and *per Eminentiam*, if singly used (and not determin'd by other Circumstances) it denoted those of the Crown, that is, all Persons who held of the Publick; and like the Word Tenant *in Capite*, did not denote Tenants by any particular Service, but might with equal Propriety be predicated of all that were so. They were, as we have seen, of

^w *Selden's Titles of Honour*, 448.

three Kinds, *viz.* Tenants by military Service, Tenants by Grand Serjeanty, (in the Sense we have explain'd the Word in) and the Boroughs.

That the Reader may the better judge of the Truth of this complex Proposition, I shall resolve it into four simple ones, and under each offer such Reasons, as in my Apprehension prove them.

I. The Word Baron was at, and for some time after the Conquest, used of, and applied to every Tenant in chief of the Crown, by whatever Tenure he held.

The Word Baron comprised every Tenant in chief.

1st, 'Tis the Diversity of the Service that the Tenant is bound to perform that creates a Difference in the Tenure; therefore, if a Barony was a Tenure different from all others, it must be so by the Service the Tenants by Barony were obliged to perform, which none pretend to define, no, not so much as to guess at; yet two Authors wrote Treatises expressly on Tenures, and *Coke* commented on *Littleton's*; but neither in them, nor any other of our numerous Law-Books is there any Mention made of the Service of Barons, as distinct from other military Tenants; and it would be strange, very strange, to suppose, that when such Authors descend

to the meanest Tenures, even Villenage, they should say nothing of the Chief, if really a Tenure.

2dly, The Kingdom was only one great Seignior, different from the less, not in its Constitution, but only in Extent of Ground, and Grandeur of its Convassals; therefore 'tis reasonable to suppose, that the Word Baron, when applied to the great Seignior, denotes the Persons that are qualified, as the Persons are that it denotes, when applied to the less; and that the Persons who owe Suit and Service to the great Court of the Nation, are so related to it as the Suitors of the lesser Court-Barons, with Regard to the subordinate Seignories: Now, 'tis beyond doubt certain, that the immediate Tenants of every lesser Seignior were stiled Barons of the Seignior, their Assembly the Court-Baron; that all the immediate Tenants were bound to attend, and that such Attendance was Part of the Service by which they held their Land; nor is it less so that every Seignior consisted of military Persons, Officer of the Seignior, and Tenants that yielded Profit, instead of military Service; whence it seems to follow, that the Parliament consisted of the like Ranks
and

and Order of Men, and that they were also denoted by the Word Baron.

3dly, In a Charter of *Henry I.* * the Word Baron is coupled with *Dominici*, to denote the immediate Tenants of the Seigniories in the King's Possession; which Addition could not be necessary, if the Word singly used did not signify the immediate Tenants of the great Seignior of the Realm.

4thly, *Henry* the First's Convention at *Salisbury* for the doing Homage to his Son *William*, was in the first Chapter mention'd from *Eadmerus*, to fix the Signification of the Word *Princeps*, and the Expressions used by other Historians in their Narrative of this Assembly, will serve to explain the Word Baron; all the Lay Persons that are mentioned by two other Historians as present being comprised under the Name of Barons: Now, the Arguments that were produced to prove the Tenants in chief were comprised under the Word *Principes*, proves the like of the Term Baron.

5thly, It is certain that the Prior of *Christ's Church* at *Canterbury* was a

* *Brady's History*, 144.

Baron y, yet 'tis as sure that he did not hold by any military Service of the Crown, but only in chief^z, and as I conceive, by Homage and Fealty.

*The Word
Baron
comprised
the Tenants
by Grand
Serjeanty,*

2. The Tenants by grand Serjeanty were Barons, because,

1st. In the Directions given for collecting a Tax on the Barons by King Richard I. the Tenants by Serjeanty are excepted, for which there could be no Reason, if they were not comprised under the Appellation of Barons^a.

2^{dly}, All the Lands that were, as far as we know, ever held by grand Serjeanty, were in the Hands of the Barons.

To this Proposition I am very sensible one Objection will be made, with relation to the Tenure of Lands now in the antient Family of the *Dymmocks* by the Service of being the King's Champion on the once most important Solemnity of the Coronation; to which I answer, 1st, It does not appear, that any such Tenure did subsist at the times we now discourse of; for the first Instance of it in History is that at the

^y Somner's Antiquity of Canterbury, p. 299.

^z Somner of Gavelkind, p. 210.

^a Spelm. Codex legum Anti. 350.

Coronation of *Richard II.* ^b *2dly*, For ought appears, this Tenure, if then subsisting, might rank the Tenant amongst the Barons, which they might possibly lose, on the Exclusion of the lesser Barons. But *3dly*, and *lastly*, I conceive that this was really no Tenure by grand Serjeanty in the Sense we have explain'd these Words. For the clearing this Point, 'tis to be known, that antiently in many Cases Controversies were decided by single Combat betwixt the Parties before the Peers. Our old History and Law Books are full of Instances of this Nature which need not be here inserted; Women, for their Weakness; Ecclesiasticks, from their Profession, were permitted to appoint others to fight for them, who were call'd their Champions: And no doubt the regal Dignity entituled the King to the like Privilege. Now the Champion being only authorised by the King for this particular Purpose, his Service seems related to the separate Benefit of the King, and not to that of the publick; and therefore in the Sense we have explain'd these Words, his Tenure was petit, and not grand Serjeanty.

^b *Tyrel's History*, 3 Vol. 830.

All military Tenants of the Crown were Barons.

3. All the immediate military Tenants of the Crown in the Conqueror's time, and 'till some time after King *John's Magna Charta*, were comprised under the general Appellation of Barons.

Of Earls.

The military Tenants of the Crown have been divided into three Classes; viz. Earls, Barons, and Tenants by Knights Service; of which in Order.

Division of Earls.

Earls are by our more modern Authors distinguished into two Kinds, viz. Earls Palatine, and Earls without that Addition; but I should desire the Reader to consider the following Reasons before he gives into the vulgar Opinion.

Of Earls Palatine.

1st, in Foreign Countries, where the Word Palatine is more antient, the Difference does not consist in their enjoying, or participating more or less of the Sovereignty in their several Territories, but in their different Services they were to render to the collective Body of the State, which was briefly this; the *Comes Palatinus*, or Earl Palatine, was the chief Justice of the Palace, resembling our *Eldermanus totius Angliæ* in the time of the Saxon Government, after to the *Justiciarius*, or *Seneschallus Angliæ* in the Norman time, and the Major of the Palace in France, and

and the only Palatinate in *Germany* is that of the *Rhine*, whose Office was to preside in the Judicature of the Empire^c, which sitting in the Palace, he is thence in *High Dutch* call'd *Paltz Grave*, which signifies Judge of the Palace.

2dly, In *England*, *Durham* is now known under the Stile of a Palatinate, yet 'twas first given to the Bishop by King *John*, who it seems, from his saying he made a young Earl out of an old Bishop, thought he made him an Earl, by giving him the County, but was not then acquainted with the Word Palatine; and the Bishoprick of *Durham*, though since denominated a County Palatine, was in antient Grants and Records only stiled a Liberty, which Term in our Law Language is equally applicable to the Isle of *Ely*, and every other District that holds Plea within themselves^d.

3dly, The first Palatinate that is supposed to have been created in *England* is *Chester*; but 'tis obvious that Term was not included in the Grant to *Hugh Lupus*: And a very curious and diligent Searcher into the Antiquities of

^c *Strykii Jus Feudale*, 112.

^d *Cambden's Britan.* 934.

this

this Kingdom, even the great^c Mr. *Cambden*, assures us, that neither he nor any of his Successors, ever had the Stile of *Comes Palatinus* in any Grant or Record.

4thly, The Earldom of *Shrewsbury* was term'd a County Palatine; and yet 'twill not be found, that the Earls of *Shrewsbury* had any Prerogatives superior to those of other Earls.

5thly, The Word *Palatinus* whence our *English* Palatine is deriv'd, comes from *Palatium*, which was used to signify the Court of Justice; and indeed in no other Sense but with Respect to the Administration of Justice is the Word used: The Administration of Justice in the Counties was equally vested originally in the respective Earls of each. And all Earls had an equal Share in the great Court of the whole Kingdom; so all Earls here seem to have been originally equally, that is, not at all instituted to that Appellation.

Whether
any, and
what Dif-
ference be-
twixt
Earls and
Barons.

The supposing a real Distinction between Earls and Barons so antient as the times we speak of, seems also ill grounded, for they are by very good Authors said to be the same^f; and the

^c Vincent against Brook.

^f Selden's Titles of Honour, 553.

Definition *Selden* and *Cambden* give of a Baron does ^z equally agree to both; all the Difference I can find between Earls and Barons, whilst both were feudal, is only this, that the Barons were the Chiefs of one Tything, or several Manors, that were given as aforesaid by the Conqueror to one of his Confederates, who thereby became the Superior thereof; whereas, the Earl with us was the Superior of the Division of the *Saxon* Shires: Nor in my Apprehension, without making this the *Differentia proxima*, can any Definition be given of a Baron that does not agree to an Earl; and indeed this seems to have been the Notion of Antiquity: for the collective Body of our Nobility immediately on the Conquest, as in *Normandy*, were, as at this Day ^h, denoted by the general Term of the Baronage.

It has been already remark'd in the first Chapter of this Essay, that all the Earls and Barons in *Europe* did antiently hold of the Kingdom, not of the King solely: I shall therefore here only add such Observations as may serve

That the Baronage hold of the collective Body of the State.

^z *Selden's* Titles of Honour, 353. *Camb. Brit.*

^h *Madox's* History of the Exchequer, 133. *Coutume de Norm.* 287. *Finch* lib. 2. c. 1.

to evince, that it was so on the Conquest in this particular Kingdom.

1. Many of the Persons who came over with the Conqueror, had no sort of Relation to, or Dependance on him antecedent to the Conquest: Those who were *Norman* Barons held of the Community, not of him solely; and 'tis by no Means probable that they would descend to submit to the same Subjection to him with his own immediate Vassals.

2. Not one of our *Norman* Kings, though great Extenders of the Prerogative, ever assum'd, and many disclaim'd all Pretence to the depriving a Baron of his Barony without the Judgment of their Court, that is the Parliament; and some have demanded the Judgment of the Peers against Barons whom they thought *delinquent* ⁱ.

3. All the old Memorials, and nearest the time I now treat of, commonly call the Barons *Barones Regni*, not *Barones Regis*; so they are stil'd in the *Register* ^k, a Book of as great Antiquity and Authority as any in the Law; so are they term'd by Lord *Coke* ^{*}, and in pleading, which requires the

ⁱ *Brady's History*, 229 and 657.

^k Fol. 179. ^{*} 3 *Instit.* 46.

greatest Nicety and Exactness, the Form is at this Day, *Unus Parium Regni*¹.

The Sovereignty of the Baronage over their Vassals, that is not an absolute Dominion, but such as the King had by Law over his, may be proved by four kinds of Arguments, viz. their Origin, of which enough has been already said; the Names they are denoted by, the Words used in their Creation, and the Power they exercis'd: Of the three last in Order.

*And were
Sovereigns
over their
own People.*

They are frequently in old Writers stiled *Principes, Reguli & Reges*^m.

The only Form of making an Earl, which is supposed so old as the Conqueror's Days, is that by which *Hugh Lupus* was created Earl of *Chester*; the Words are, *Tenendum ita libere ad Gladium sicut ipse* (the Conqueror) *tenebat Regnum Angliæ*ⁿ.

Power the Barons exercis'd equal to any King of *England*, that has not exceeded the Law; they made Subinfeudations, which by the feudal Law in its Purity both abroad, and as it seems by the Statute of *Quia Emptores ter-*

¹ *Salkill's Reports*, 509.

^m *Dufresne* voce *Par*; *Taylor* of *Gavelkind*, 40.

ⁿ *Davis's Reports*, 62. *Dodridge's Principality of Wales*, 124. *Cambden's Britan.*

rarum, here none but Sovereigns could do, because Homage and Fealty, the only Ties betwixt Prince and People was incident to them; they also made Laws in their Courts, and judg'd there^o; which Power was so far from being an Usurpation, that by the Law of *Henry I.* it is expressly provided, that the Baron's People shall not be obliged to abide by the Determination of the King's Court^p; and therefore Earl *John's* Man refused to answer even an Accusation of High-Treason in the King's Court; and also gave that for a Reason why he would not be Security for the Payment of the King's Ransom^q; though by the feudal, a Vassal is bound to redeem his Lord out of Captivity, under Pain of Forfeiture. They coin'd their own Money to King *Stephen's* time^r, which we find noted in those Times as a Proof of independant Sovereignty^s, gave Boroughs a Right to send Members to Parliament, Exemptions from other Courts, and Power to

^o *Davis's Reports*, 62. Answer to the *Janus*, 16. *Daniel* 50. *Spelm. Codex Leg. Antiq.* 345. *Brady's History*, &c.

^p *Spelm. Codex*, 314.

^q *Brady's History*, 404 and 442.

^r *Hale of Sheriffs Accounts*, 4.

^s *Grotii Historia* Gott. 386.

hold Plea^t, pardon'd Treasons, Felonies, &c^u. and their Tenants and People paid and yeilded them the self same Aids, Tallages, and Services that the King had of his, nor were their Vassals talliable to the King[†].

Lastly, The Vassals of the Lords did Homage, and swore Fealty to them, and as it seems, not to the King at all; for no Person could be a Leige-man to two Lords; and Earl *John's* Man declared he was not bound to the King by Homage or Fealty, and they did both in like Form that the King did to him*. To explain this Matter to Readers not versed in the Feudal Law, it is to be noted, that Fealty might be sworn generally, and then it was called an Allegiance, and the Person that took it was called such a Lord's Leige-man, or, with an exception, as saving the Faith that I bear to our Sovereign Lord the King, or under a Limitation, as for Land and Tenements I claim to hold of you. Originally the Barons People swore Fealty absolutely, and so were Leige-men to the Barons. This was so far from being an Usurpation, that the Vayassors

^t *Brady* of Burroughs, 44 &c.

^u Vide Stat. 27. H. 8. cap. 4, 24.

[†] *Madox* Hist. of the Excheq. 498.

* *Brady's* History 534. Spell. Rem. 59.

Relief is by a Law of the Conqueror's directed to be paid to his ^x Leige Lord. The Conqueror in one of his Writts mentions the Abbot of *Ely's* Liege-men^y, and the Barons Liege-men are mentioned by *Henry* I. in one of his Charters, and the Abbot *Ramsfey's* Liege-Men are also mentioned under the same King's Reign; and this unlimited Manner of doing Homage, without any Reservation of the like Duty to the supreme Lord, continued abroad till the Year 1152, and was practised here in *Henry* II's. Time^z, and for ought I can find, was first disputed in *Edward* I. and was last finally abolished by an Act of Parliament passed in 17 *Ed.* II. which prescribed the Form that the Lords Vassals shall do Homage and swear Fealty in; yet after, in *Ed.* III's time, even in the famous Act of the 25th of his Reign, the Breach of the Oath of Fealty in killing King or Lord is denoted by one common Name of Treason. The Attendance of their Vassals at Court-Leets is in our old Law Books, called Suit Real^a, and the Word Real is an antient *French* Term for

^x 2 Inst. SL. Saxo 223.

^y Brady's Appendix to his History, p. 4.

^z Spelm. in voce ligeantia.

^a Pasl. 12. H. 7. fol. 16. a. Old Tenures last Chap.

Royal^b. Lastly, if the Year Books, which, considering the Manner they were collected, are little less than Records, are to be believed^c, till *Ed. I.*^d Time, who first introduced the Form of Petitioning the King, he and the Barons were impleaded in the same Manner, even in Entry on Disseisins and all manner of Actions^e, according to *Cavendish*, who was soon after advanced to be Chief Justice^f, and in the same King's Reign *Wilby* said he had seen a Writ in this Form, *Precipe Henrico Regi Angliæ, &c*^g.

If any one, not versed in the Feudal Law (for those that are will not) should object, that the Barons could not be Sovereigns over their own People, because they did Homage, and swore Fealty, to the King: I answer first, 'tis already proved, that they were done and due to the Community of the Realm, and not to the King only. 2. 'Tis noted above, that these were things incident to all Feudal Tenures, which were only unequal Leagues. 3. That the same

^b Answer to *Petty*, 134. *Dyer's Reports*, 44.

^c Pl. 12. *Tyrrel's Append.* to the 3^d Volume of his History, 70. *Tyrrel's History*, 3 Vol. a. 73.

^d *Plowden's Preface* to his *Commen.* p. 1.

^e *Hill.* 22. *Ed.* 3. 3. *Mic.* 43. *E.* 3. 22.

^f Vide *Dugdale's Catalogue* of the Judges.

^g T. 24. *Ed.* 3. 55.

Objection lyes against the Sovereignty of the *German* Princes in the Empire, which has been asserted by the two greatest Civilians that ever lived, to whose Writings, for brevity sake, I refer the Reader^h.

*That there
were no
military
Tenants of
the Crown
besides
Earls and
Barons.*

The third Class that, as is observed, the Military Tenants of the Crown are by some divided into, is to be now the Subject of our Consideration; but, the Truth is, this Division arose from an Ignorance of Antiquity, and judging of what was 700 Years ago by modern Times, which has led many into Errors, and been the foundation of much Confusion. In the present Case, if by the Word military Tenant, is understood one who held immediately of the Crown by the military Service of leading a certain number of Men, then, no doubt, they were either Earls or Barons, for such was part of both their Duties; but then this Service is not distinct from theirs: On the other Side, if by Tenant by military Service is meant one who held by the Service of attending himself without any Followers, this Distinction is un-applicable to the Times we speak of; for, in Truth, there

^h Vinnii Quæstiones 105. Grot. de J. Bel. & Pac. lib. 1. c. 3. s. 23. par. 2.

was not in the Conqueror's Time, nor for some Time after, any Person who held of the Crown by such a Service, of which I think the very Constitution of the Conqueror's Army, and the Manner of their Settlement here, is an abundant Testimony : For, besides the Conqueror himself, all Persons in it were either his immediate Followers, or the immediate Followers of some of the *Norman* Barons or neighbouring Princes that assisted him ; his, and the Followers of the other Chiefs were, as has been observed, their Tenants, with respect to their several subordinate Seigniories they were respectively possessed of, and composed the Court Barons in them. The Chiefs became Lords thereof, and held of the great Seignior of the Realm by a determined Number of military Men. Further, 'tis plain by a Law of *William* the Conqueror's, which is also cited by Lord *Coke*, from a Manuscript of Archbishop *Parker*ⁱ, and directs the payment of Relief by Earls and Barons to the Crown, and that the Vavassor shall pay Relief to his Liege Lord ; from whence it follows, first, That these were the only military Tenants then known.

ⁱ L. Sax. 223.

² Inst. 8.

2. That all who held of the Crown were then understood to be Barons, because it is certain that all Tenants of the Crown paid Relief to it. 3. That all these Barons had sub-military Tenants, for such does the Word Vavassor denote.

That under the Appellation of Baron, the Burghers were originally comprised.

4. The Word Baron did comprise the Burghers, who held their Burroughs immediately of the Crown. To clear this Point, it mayn't be improper to give a short Delineation of the antient Condition of the Burroughs, they having been plumed even as much as the Barons themselves ; for as they were originally so many Sovereign Princes, so were these as many little Commonwealths. But I will be very brief on this Subject, because there is hopes of seeing the antient State of the Burroughs explain'd by the most accomplished Writer this Age has produced.

Derivation and Sense of the Word Burrough.

The Word Burrough is derived from the *German* Burg, which signifies no more than a Place where many People inhabit ; and, it seems, in old Authors was promiscuously applyed to all Places where there was a contiguity of Buildings. In this acceptation of the Word, Burroughs are aptly divided, by Dr. *Brady*, into free Burroughs, and those that are not free. In Law the Word Burrough

rough has now a more limited Sense; for Places which have a Contiguity of Buildings are, by^k *Littleton*, divided into Towns and Burroughs, the first, says he, want many Privileges the others have, and then mentions some, *viz.* That a Burrough may prescribe for many Customs, a Town cannot; the present Cities were originally called Burroughs, and that the Burroughs send Members to Parliament. The Description given by *Brady* of his second kind of Burroughs answers exactly to that we have now given of Towns and Burroughs. Hereafter the Word shall be used in the legal Sense only.

All Burroughs may be most properly divided into such as remain'd in their original Condition, and those that in process of Time became so.

The Manner of making a Place a *Burroughs*, Burrough seems to have been thus, *how made.* When any Place, whether the Land was parcel of the King's or any of the Peers Mannors, (for that either could make Burroughs is already proved) was inhabited by Tradesmen, of which sort Burgeses seems solely at first to have consisted, and the Land where such Person dwelt was let by Lord or King to the

Inhabitants in Fee-farm or Serjeanty, and all other Duties and Services released than by the extinguishment of the Mesne in case the Lands were held of some Lord; or if of the King, by severing it from the Seigniorship of which 'twas Parcel, the Inhabitants having no Superior but the great Community of the King and Parliament, to whom thereby their Fealty and Homage was only due, their Infranchisement gave them a Right to a Share in the Legislative Power of the Kingdom. That which renders this Supposition the more probable is, that the releasing the Lords superiority to particular Persons, when none voted for Knights of the Shire but the immediate Tenants of the King, (as none originally did) gave the Persons, who by such Release became immediate Tenants to the Crown, a Right to vote, so, even at this Day, if a Lord infranchise a Copyholder, the Copyholder thereby gains a Share in the Legislature, and a Right to vote at the Election of Knights of the Shire; and, in like Manner, as I conceive, the Burroughs gain'd a Share in the Legislature in consequence of their Infranchisement, without any particular Grant for the same in their Charter. Dr. *Brady* boldly asserts the contrary, and makes such Right the pure Grace of the

the Superior ; and this he endeavours to support by the Charters he produces, in only some of which a grant or confirmation of this Right is to be found : But to this I answer :

1. It has been observed by a late Writer, That no such Clause is to be found in any Charter older than *Edward IV's* Time¹; therefore if the Right arises by Charter, those Burroughs, who have Charters more antient than that Time having no such Clause, have no Right to send Representatives, and consequently we have been under a Mistake all this while ; which is too absurd to be believed.

A Burrough does not derive Rights from any Charter.

2. ^m *Selden* observes, That in the Style of the Chancery till *Henry II's* Time there was little difference betwixt Grants which are commonly understood to be creative of a new Right, and Confirmations which are only recognizing a former ; and we yet in our Deeds crowd in the Word Confirm, with the Word Give and Grant : Further the excellent Mr. *Maddox* observes as “ That the most
“ antient Confirmations made after the
“ Conquest often run like Feoffments,
“ with the Words *Dedi*, or *Concessi*,

¹ *Tyrrel* Appen. to his 3^d Volume, p. 151.

^m *Titles of Honour*, 539.

“ and

“ and *Confirmavi*; and are distinguishable from the Feoffments chiefly by
 “ some Words importing a former Feoffment or Grant, as where they run
 “ *Dedi* or *concessi* & *confirmavi*, such Lands, *sicut charta facta*, to such a
 “ One (either the Confirmatory or his Ancestor) Testator or the like. In
 “ antient Times, when Feoffees were frequently disseised of their Lands
 “ upon some suggestion or other, Charters of Confirmation seem to have
 “ been in great request. For in the early Times, after the Conquest, we
 “ meet with so many Confirmations successively made to the same Persons
 “ or their Heirs or Successors of the same Lands and Possessions, that it
 “ looks as if Men did not think themselves secure in their Possessions against the King or other great Lords
 “ who were the Feoffors, or in whose Fees the Land lay, unless they had
 “ repeated Confirmations from the King or his Heirs or Successors, or the other
 “ great Lords or their Heirs. ” From these learned Authors we see that those Words the Doctor takes to be creative of a new Right will bear another Construction, and that the Confirmations were sought on prudential Motives only.

In these Burroughs the Community of Burgesſes exerciſed the ſelf ſame Pre-rogatives and Powers within the Burroughs, that the Earl or Baron did in the Earldom or Barony, and were Lords of the Manor or Diſtrict of Land that compoſed it, they as the Earl or Baron in the Earldom or Barony with the Concurrence of the Suitors exerciſed not only a Judicial but alſo a Legislative Power. Their Laws were called, By Law, from two old Words By and Lagen, which may be aptly rendred Burrough Laws : Nor does it appear that in the Times now treated of, the Aſſent of any but the Burgeſſes was neceſſary to give them an obligatory Force. From this legislative Power in Burroughs we may diſcover the Reaſon of the Diverſity we noted out of Lord *Coke*, concerning a Burrough's preſcribing for Cuſtoms which a Town cannot ; for thoſe Cuſtoms were originally ſo many Rules of acting preſcribed by the Legislature of the Burroughs, which being diſuſed are ſaid to bind by Preſcription, even as many things firſt eſtabliſhed by the Legislature of the Kingdom are now ſaid to bind by Common Law, which is agreed to differ from Cuſtoms only in the extent of Ground where they have the force of Law ; thus if it binds
through

The Pre-rogative of the Burroughs.

through the whole Kingdom, 'tis called Common Law, if in a Burrough or Manor it is called Custom, now Towns being parcel of a Manor, which is one Royalty, cannot prescribe for Customs, because the Orders made at the Manor Court bind not only the Town but the whole Manor; for in all Cases, by the Rules of Law, the Prescription must be as extensive as the Custom: Whereas Burroughs being a distinct and entire Liberty, may prescribe for Customs within the Extent of their own Territories.

In many Burroughs by their gradual decline from Riches, these Powers have been lost and even their very Remembrance is vanish'd, but in others we see them yet subsisting, in the City of *London* rather singular in the having preserved Her Immunities, than in having any peculiar to it self. So late as *Henry VIth*'s Time, such was the Power of the Mayor that the King's Soldiers were refused Passage through the City^o, even yet the Sword and Mace, the two great Emblems of Authority, are carried before their Mayor; How many other Franchises do they exert, and how small a Part are even those of what they are entituled to?

° Vol. I. of the Collect. of the Hist of *England*, 421.

The very Etymology of the Word *Burger* and *Burgess* are a plain Indication that the Word *Baron* in its original signification might be applied to *Burgesses*; for, as has been already observed, *War* and *Bar*, whence the Word *Baron* is derived, were the same Word founded and spelt differently: In *England* and *France* that they both signified Man is agreed, and in the *Saxon Burgh War* signified the Men of the Burroughs, whence by Corruption was derived our more known Words *Burgers* and *Burgess*. Was it not then a very proper Version of the *Saxon* Phrase in the Dialect of that Age to render it in *Latin* by *Barones* in the plural Number, for in the Burroughs the old *Saxon* equality being preserved all the Inhabitants were Barons alike.

In the Conquerour's Time we find many Instances of the *Burgess*, in several Towns, being call'd Barons. One Writ of his is directed to the Portgreve and *Burgess* of *London*, after another to the Mayor and Barons^p; yet 'tis obvious they must be the same Community, in the one denoted by their *Saxon* and the other by a *Norman* Appellation. In another of *William* the Conqueror's * Writs, the *Burgesses* of *Carlisle* are so stiled;

Derivati-
on of the
Word
Burger.

^p Argument Antinor. 74.

* Idem 82, 83.

in *Domesday* the Burgers of *London* and *Warwick* are called Barons; * and this appellation of the Word Baron continued some time after the Conqueror, for in several Charters pleaded by the City of *London* to the *Quo Warranto* formerly brought against them, they are so stiled †.

The Inhabitants of the Cinque Ports, tho' no body doubts their being Commoners, were not only antiently stiled Barons, and amerced as such, but even retain that appellation to this Day; nor are they the only Burgesses that have of late used it, for the Burgesses of *Corfe Castle* in a Letter to their then Representative (*Hobart*, who was afterwards Chief Justice) so stile themselves †.

If it be ask'd how this Word, originally applicable to all Burroughs, became confined to the Cinque Ports, I think it may be fairly answer'd, that the Bulk of the People, and infinitely the greatest Part of the Language, being *Saxon*, 'tis no Wonder that the *Saxon* Appellation did prevail elsewhere universally; and the Use of the *Norman* Term Baron remaining with respect to the Inhabitants of the Cinque Ports,

* Camb. Brit. 239.

† Pleadings in the Q. W. 2, 3, 8, 9.

† Willis's Not. Parliamen. Vol. II. 499.

may with great probability be imputed to the frequent Journeys our Kings made through these Places to their Dominions in *France*, and the great Number of *Frenchmen* we know they settled in them, being Places then of much greater Importance than now.

That the Tenants, by grand Serjeanty, were comprised under the Name of Barons, is already proved; nor is it, I think, deny'd by Dr. *Brady* and his Followers: Now 'tis certain, that many Burroughs and Cities held, and yet do hold, by grand Serjeanty; thus the Mayor of *London* is, as such, the King's Cup-Bearer at the Coronation, and the Barons of the Cinque Ports always support the Canopy at that Solemnity. Therefore it seems that these were as well, in point of Rank, entituled to the Appellation of Barons as any Persons whatsoever; for if the Importance of a Coronation is rightly understood, these Services will be found equal in Dignity to the most Honourable.

It being, I think, undeniably proved, ^{Of whom the Parliament consisted,} that the Word Baron did denote all the immediate Tenants of the Crown, *viz.* Besides the Ecclesiasticks, the Earls, Barons and Burgeses, we may without Hesitation (all History, antient Monuments and Authors being agreed, that

the Parliament did consist of Barons) assert, That in the Conqueror's Time these three Ranks of Laymen were Members of the Legislature. But for the further clearing that the Burroughs had and exercised this Right, it being so positively denyed of late, I would offer to the Reader's Consideration the following Particulars.

*Further
proofs that
the Burg-
ers were
Part of the
Legislature*

1. The Burroughs, as has been proved, were vested with this Right in the *Saxons* Time; therefore, unless the contrary is proved, 'tis to be presumed they had the same under *William I.*

2. It seems to have been the universal Notion of all the *Gothick* Nations, and, in particular, of our *Saxon* Ancestors, which is also agreeable to the Rules of Reason, that Freedom consisted in the being subject to no Laws but such to which the Person who is bound consents; therefore the Burroughs could not be called free, nor the Inhabitants of them Barons, unless they had some Share in the Legislature, and consequently a Seat in Parliament.

3. Parliaments, and a Convention of the Estates, seem originally to have had one signification, both in this and other Kingdoms; and that a Convention of the Estates was only a Meeting in Person, or by Representation of all the Propri-

Proprietors of Land is certain: Now, considering all the others were represented, to suppose the Burroughs, were not under which Name *London* and all other Cities were originally comprised, making so considerable a Part of the Kingdom, seems unreasonable and improbable.

4. The Right of the Barons being built on their Tenures, and annexed to their Land, whence their very Possessions were styled a Barony, a Name very lately well known in our Law Books in that Sense^s, and the District of Land that composed any one Baron's Estate being infinitely inferior in its consequence to the Publick to many Burroughs, for no Baron's Estate can be supposed equal to the Cities of *London, York, Exeter, Bristol, &c.* the Community in these Places had the same Foundation to claim a Share in the Legislature that the Barons; had and therefore 'tis to be presumed they had it, unless the contrary can be proved.

5 When the Summons to Parliament first came in use 'tis hard to define; but it should seem by a Clause in King *John's Magna Charta*, which will be cited at length below, that the difference betwixt a general and particular Sum-

^s T. Jones Reports, p. 164.

mons was a thing then well known: If so, a new Proof of the Burroughs sending Members to Parliament may be thence collected; for they being all equally Barons, and the Body Politick of the Burrough Tenants in Chief of the Crown, the Summons could not be to any particular Person, as in case of Feudal Baronies, but must be to the Body Politick, who being in that capacity unable to act, the Authority necessarily devolved on some of the Community, who became vested with it by delegation from the Collective Body of the City or Burrough.

The Hypothesis proposed, compared with the Saxon Constitution.

If we compare the Hypothesis here offer'd of the Legislature in the Conqueror's Time, with what has been said concerning it in the *Saxon*, we shall see a visible Coherence, nay almost Uniformity, betwixt them, which, however, has been little or not at all observed; for the Ecclesiasticks in the *Saxons* *Witena Gemot* and *Norman* Parliaments were the same, so were the Earls; the only diversity that can possibly be found is in those whom the *Saxons* call *Wites*, and them we have here proved to be stiled Barons and Burghers; and yet that will on due consideration appear inconsiderable, for, as has been proved, the *Wites* were the Superiors of the
Saxon

Saxon Tythings, and as such, had their Seat in the *Witena Gemot*. We have observ'd also, that these Tythings were call'd Boroughs; that they were of two kinds, Rural and Town Tythings, and that the hereditary Superiority of the Rural ones was confer'd, on the Conquest, on some *Norman*, some *English*, which Tythings being generally given to the former, receiv'd the Denomination of Honours and Baronies: And as the Superiors in the *Saxon* time were by their being so, Members of their Legislature; so these by the like Reason were Members of the *Norman* Parliament; with this only Difference, that as these were possess'd of their Superiority by Election, and for a Time only; so was their Right to sit in the Legislature only temporary: Whereas, these being the hereditary Superiors, had this amongst other Rights of Superiority in Succession: And as the *Saxon Wites* serv'd for their Tythings, so were the Barons by Law intended to serve in Parliament for the Tenants of their Baronies^t, which we're told by good Authority^v, is the Reason why their Tenants were exempt from contributing

^t *Moor's Reports*, 768.

^v *Crompton Jurisdic.* 17. 11 *H.* 4. 2. 4. 12 *R.* 2. c. 12. 28 *E.* 3. 23. 2 *Inst.* 26.

to the Wages of Knights of the Shire; the Trading Tythings remain'd Members of the Legislature as before, and consisting chiefly of *English*, retain'd their *Saxon* Name of Borough, a Share in the Legislature by Election, under another Denomination, that of *Wite* being lost, probably because 'twas not conferr'd always on the Magistrates and that of Burgeses becoming in Use: Thus was every Spot of Ground still represented; for, as in the *Saxon* time, every Part was within some Tything, so in the *Norman*, every Part of the whole Kingdom was within the compass of some Barony, or some Borough.

And explains several Things subsequent to the Conquest.

If we look into the Times after the Conquest, we shall see the Hypothesis here propos'd as exactly tally with them as with the former. Amongst many remarkable Instances that might be given, I will in this place only mention four.

1st, This Hypothesis agrees with the universally receiv'd Opinion of our most judicious Writers, who all allow, that the Citizens and Burgeses sat in Parliament long before any Knights of the Shire were chosen; and that both Houses originally sat together^w.

^w *Atkins's Rights of the Com.* 24, 26 and 35.

2dly, We see here a good Reason why the Parliaments were the supreme Courts of Judicature, and why Writs of Error did, and still do lye to Parliament; and though the House of Peers are now the sole Judges, yet is the Error supposed to be redress'd in Parliament; for the Parliament consisted of Earls who presided in the County Court, Barons who did the like in the Court-Baron, and the Representatives of the Boroughs where the Community judged; what then would be more natural, than for the Errors of one Judge to be redressed by an Assembly of the chief Judges in every District of Ground?

3dly, This Hypothesis well explains not only the Origin of the Privy Council and Courts of *King's Bench* and *Exchequer*, but also their present Constitution; for Politicks, a heavenly Science, when confin'd to its only true End to make the whole happy, deviating from it, and the Number of Controversies originally cognizable only in Parliament increasing, the short time they sate occasion'd, as I conceive, the appointing at first one Committee of Parliament, both to advise the Crown in Matters of State, and judge of Controversies, when the Parliament did not sit; the Multiplicity
of

of Business after occasion'd the appointing of three, one for State-Affairs, the other for criminal Matters, the third to regulate the Receipts, perhaps the Disbursements of the publick Money: From the first of these came the Privy Council; Hence the Office of a Privy Counsellor is for the joint Lives of the King and Counsellor^x, for, being originally appointed by Parliament, no Authority but Parliamentary can displace him; and as the King's Death dissolv'd the Parliament, consequently, it determin'd the Privy Counsellor's Office: Hence the Method now in Use of excluding a Privy Counsellor is not by striking his Name out of the Roll, but by omitting to summon him. From the other two were deriv'd the Courts of *King's Bench* and *Exchequer*. This Origin of those Courts discloses the Ground of their judging Causes betwixt the King and Subject, which the *Common-Pleas*, erected by King *John's Magna Charta*, does not.

And we may also hence collect, that the making the Office of a Judge for Life, at least in the two original Courts, is only restoring the antient Constitution: Why the Judges yet sit in Parliament, and once were of more consequence than they are now, and

^x 4 Instit. 54.

that

that consistently with *Magna Charta*, they amerced Peers.

4thly, This Hypothesis shews the Reason of Writs of Error lying from the *Common Pleas* to the *King's Bench*, and not to the Parliament; and why those from this Court are returnable in Parliament, and not before the King, before whom in Reason they ought to be, if the Judges originally deriv'd their Power from the King only.

The Proofs of our Hypothesis that have been already produced are drawn from our own Writers, or from the present Constitution; many more might be collected from the History of other Countries, where our *German* Ancestors settled themselves: For, as has been already on another Occasion remark'd, these Nations having lived at home under the same Form of Government, establish'd it in all their Conquests; but that would be too extensive an Enquiry, nor indeed have I all the Books before me that are necessary to do it, with the Exactness which ought to be aim'd at in every thing that is offer'd to the publick. I will therefore confine myself, to shew the Parity betwixt the Scheme of Government that is here delineated, and that in *Scotland*, and *Germany*: I chuse these

these Countries rather than any other, because betwixt the Laws of *Scotland* and *England* there was antiently so great a Uniformity, that 'tis question'd, whether the oldest System of Law in each Country are one and the same, or different Books; the Reason for chusing *Germany* for the other Country, where we may expect a Constitution like our own is, because our *Saxon* Ancestors came from thence, and that the Bulk of the People and Language are deriv'd from them.

*Compar'd
with the
Constitu-
tion of
Scotland.*

In *Scotland* we find plainly, that all the immediate Tenants of the Crown are call'd Barons, not only in their Law Books, but also in many Acts of Parliament, which is sufficient to evince the Use of the Word there, and seems a strong Evidence of its original Notation here. We need not spend any time neither I think, to shew that every Baron was originally a petty Prince; their History abundantly shews the Power of the Superior over his Vassals, and we have lately seen how much that Power yet subsists. In *Scotland* also till the Year 1425, we may infer, that all the Barons came to Parliament, because an Act pass'd that Year, in which 'tis recited, that all the immediate Tenants of the Crown were obliged to attend.

The

That the Burghs in *Scotland*, where the Term undoubtedly is only apply'd to those who hold of the Crown, had within themselves a legislative Power, and were so many little Common-wealths, is evident by their Laws that are in print: And though I make no doubt, but in the earliest times they sent Members to Parliament; yet there not being such direct Evidence of it, at least that has yet fallen under my Observation, I must leave this on the Probability of the Thing; but that their Parliament was only the King's Court-Baron, and their Courts of Judicature and Privy Council originally only Committees of Parliament, we are assur'd by one of the ablest Men that ever adorn'd this Isle y.

The Government in *Germany*, even at this Day, is conformable to what we have suppos'd ours was; the Emperor is equal to what our King was, the Princes to our Peers, the free Cities to our Boroughs, their Dyet and our Parliament differ only in Name, *And the German Empire.*

On the solid Foundation we have here represented was the Government built when *William* the Conqueror dy'd; his younger Sons *William* and

y. *Mackenzys* Institutes of the Laws of *Scotland*, 18 and 23. *Craig de Feudis*, 36, &c.

Henry successively came to the Crown, and for ought appears changed nothing in the Legislature; the latter of these dying, left the Kingdom to the rapacious Seizure of *Stephen*, Earl of *Blois*, who had no colour of Title; for he ascended the Throne to it, tho' not call'd by the free Consent of the People, nor claiming it by Proximity of Blood: As he obtain'd it unjustly, so his Reign was one continu'd Series of Violence, and little Artifices, for the preserving his ill-got Possession, of the last two affected the Constitution of the Legislature in its most considerable Ranks, I mean, in the Earls and military Barons; of which in Order.

*Stephen
made Earls
without
Counties,*

'Tis related of this Prince, that he made Earls without Counties; but whether these were originally made without having any County appropriated to them, or whether they had Counties at the time of their Creation given that were vested in others, whom this King consider'd as forfeited, for sideing with his Enemies in the Civil Wars; and after the Pacification, on the Pardons that were granted, the former were continu'd, or re-instated in their Possessions; and so these new created Earls retain'd nothing but the Title of Earl, is a Question I must leave to be decided by

by others ; for I have not yet found sufficient Reasons to ground any Opinion on.

The Barons, as we have seen, were feudal, and so many little Princes, they being divided in the Civil War betwixt *Stephen, Maud, and Henry II^d*, each Party treated those of the other Side as Rebels; and in consequence thereof forfeited such of their Adversaries as they could : This brought the immediate Possession of much Land to the contending Princes, who with it remunerated their respective Friends. The Power of the Barons over their own Vassals each Side had sufficiently experimented in the War, which seems to be the Reasons why the Fees of the new Feoffments made by these Princes were of lesser Districts, so many being to be rewarded ; and also, because thereby more were drawn to an immediate Dependance on themselves, and not on any of the Barons : Hence the Baronies, as they escheated, were split into smaller Tenancies in chief, who all held immediately of the Crown. As the Number of the new Feoffees was great, hence arose the Distinction of Fees into Fees of the old Feoffments, and Fees of the new Feoffment, which is computed from *Henry the First's* Death ; and as all Antiquaries agree, the Fees

*and split
the Old
Baronies.*

Greater
and lesser
Barons.

Of these several Feoffments differ'd in nothing but their Extent^z: To me it seems, that this also gave Rise to the well-known Difference of greater and lesser Barons.

Henry II.
un-earl'd
Stephen's
Earls,

but conti-
nu'd his
Practice of
splitting
the Baro-
nies.

Henry II. succeeding to *Stephen*, un-earl'd all the Earls that had no Counties; but whether he did this to restore the antient Constitution, or out of any Dislike to the Persons who were vested with this Title, is not clear: However, both his Mother and he seem to have regarded it; for in their Creation of *Geoffrey de Magnavilla*, the Patent conveys the third Part of the Profits of the County, as Earls usually had^a: With Relation to the Barons, this Prince pursu'd King *Stephen's* Policy in granting small Fees; of which the Feoffment of *Berkley* Castle to the Ancestors of the present noble Earl of that Name, is a memorable Instance; the Service originally reserv'd by this King being only five Knights, as appears by an Inquisition taken in *Edward* the Third's time. The State of the Law of those times affords also another Evidence of the Multiplication of Tenants *in Capite* in King *Stephen* and King *Henry* the II^{d's} Reign; for by the then Law, as well

^z *Madox's History of the Exchequer*, p. 402, &c.

^a *Spelm. Codex leg.* 319. *Cambden's Britan.* 237.

as after by *Magna Charta*, all were to be judg'd by their Peers; that is, those who were their Convassals in the same Court: Now these Tenants *in Capite*, in consequence thereof, could only be judg'd in Parliament; which in those Days sitting but a little time, could not decide all Controversies that happen'd amongst them: Hence arose the Institution of Justices *Itinerant*, which deserves the more to be remark'd, because 'tis the first or second Instance that we find in this Kingdom of the legislative and judicial Powers being sever'd, and 'twas then thought a Grievance ^a.

Richard the First's Reign yields no Notes of any Change in the Persons of the Legislators, but his Brother King *John's*, as his Circumstances bore some Resemblance to that great Innovator *Stephen*, so he seems to have set him for a Pattern, inventing a new Method of making Earls; for instead of giving them the third Part of the Profits of the County, he reserv'd the Bulk to himself, and gave his Earls only a small Pension in lieu thereof ^b: This Method ^{John's new Method of making Earls.} seems to have hurry'd the County

^a *Brady's History*, 404 and 442.

^b *Camb. Brit.* 237, &c.

Court, before declining to the Circumstances we now see it in, and thereby occasion'd the erecting of the Court of *Common-Pleas*, first establish'd in this King's Reign; for the Earls, whilst they were to receive one Third of the Profits of the County, which chiefly in those Days arose from the Multitude of Suits determin'd in that Court, were oblig'd by the prevailing Tye of Interest to look into the Proceedings, support the Dignity of the Court, and on all Occasions to assert its Jurisdiction; whereas, being no ways after this new Contrivance, concern'd to increase or preserve its Revenues; they seem to have left the Suitors to apply for Justice, in Cases cognizable before them to the superior Courts; which for Reasons we need not here insist on, they often found most eligible. Thus the Earls neglecting Power, because not attended with Profit, they lost all Influence in their Counties, and made Room for the Lord Lieutenants; who, though now they are thought to supply the King's Place, yet seem originally only to have been the Earls Substitutes, and were first appointed in *Edward II^d's* Time*.

* *Tyrrel's* 3^d Volume, p. 4c8.

The Method introduc'd by K. *John* occasion'd a Difference betwixt the Manner of creating Dukes and Earls, in this and the other *European* Monarchies; for the Revenues of the Dukedoms and Counties being thus sever'd, the Titles were, as before, given away; whereas, in other Countries, no Means being us'd for that Purpose, the Sovereigns, when they had a Mind to confer Honours, parted not with the old great Dukedom, or Counties, but erected the Lands, of the Person that was to be dignify'd with a new Title, into a Dukedom or County.

The antient Manner of creating Earls, after they ceas'd to be elective, has not been yet enquir'd into, because in the foregoing time there are no Monuments remaining on which probable Conjectures may be founded: But it seems pretty clear, that in this Period of Time they were created by Patent, yet there is some doubt, whether these Patents were meer Acts of Royal Grace and Power, or whether they were really Acts of the Legislature, and the Patents themselves really Acts of Parliament. That the Reader may judge for himself, for I do not presume to give any Opinion in this case, I shall state all the Reasons I can find for their

A Doubt proposed concerning the Creation of Earls.

M 2

being

being made by Parliament, with the Objections to this Opinion, and such Solutions of them as have occur'd to me.

Feudal Earls (all were so in the time we speak of) could be made only by the Assent of Parliament, because,

*Reasons for
the Parli-
amentary
Creation of
Earls.*

1. By the feudal Law, to which (our Law being built on it) we ought in dubious Cases to resort, no Peer could be made without the Consent of the other Peers ^c.

2. The *Directum Dominium* of the Land that compos'd an Earldom, being in the collective Body of the Kingdom, the King (who was not then, nor 'till *Edward* the IVth's time reckon'd a distinct Estate, but only the Head of the whole) ^d could not transfer the Property without the Concurrence of the rest of the Body: But as a Body politick cannot act it self where any particular Act is to be done, the Execution thereof naturally devolves on the Superior, whether King or Lord, though it receives its Sanction from the Assent of the Body politick; so were the necessary Acts to the passing

^c *Hottoman's Franco-Gallia*, c. 14, &c.

^d *Tyrrel's Ap.* to the Second Volume, p. 4.

the Earldom perform'd by the King: Thus, if the City of *London* were at this Day to make a Feoffment of some part of their Land; and no Person were by the Corporation authoris'd to deliver Seizin thereof, it would naturally devolve to the Mayor; yet surely the Community would be allow'd to be the Feoffors. All Feoffments were originally made by Words only without any Writing; the Superior, whether King or Lord, speaking the Words that convey'd the Land before, and by the Assent of the Convassals, or Peers of the same Court or Community, at first, as I suppose, without any Ceremony whilst they continu'd annual; afterwards, probably for the better Evidence of the Act, the Possession being a Proof of Property, and the Execution of every Contract consisting in the Delivery of the Thing contracted for; and Land being incapable of a manual Tradition, Various Symbols were us'd to represent such Delivery. When Fees were annual, the Remembrance of the Investiture of a Feud might be well preserv'd without Writing, and consequently the Title clear; but when they became Estates for Life or hereditary, the Case being far otherwise, some Memorials of the Enfeudation were

M 3 made,

made, which were only meer Narratives of the Fact; therefore in them the Superior is nam'd always as a Feoffor, because he executed the Acts necessary for the transferring the Possession, and in the third Person; and they mention the Feoffment in the Preterperfect Tense, which testifies only a past Contract, and makes no present one. The feudal Peers there present are nam'd as Witnesses, though at the same time they assented, and their Concurrence was necessary: Hence their Names were express'd under the Clause of *hiis Testibus*. Afterwards (perhaps from the Frequency of Disputes that happen'd concerning the Exactness and Truth of these Memorials) they began to draw them sometimes in the first Person, and being yet made only for Evidence remain'd in the same Tense; but being sign'd by the Feoffer himself, a prudent Caution, when Seigniories became hereditary, the other Clause *in cujus rei Testimonium*, &c. was inserted; these were here call'd Charters, but abroad, *breve testatum*^e. In France, 'till the Thirteenth Century, the feudal Tenants were compris'd under this Clause, after

^e Craig, 137. Corvi. 109.

only the five great Officers of the Crown's Names were inserted^f; and that was deem'd so very necessary to make their Charters effectual, that if any one's Name was omitted, then was the Reason thereof express'd in the Charter^g; so in all the Acts of Moment of the old Earls of *Holland*, we find the Authority and Subscriptions of the Barons to them: The like also was practis'd in *Scotland*ⁱ; and in *England* the like Forms prevail'd, for the Laws were originally first assented to by our Kings in Parliament, as Acts of Grace now are sent down from the Crown: This is plain from what *Bracton* writes^k,
 “ *Legis Vigorem habet quicquid de*
 “ *consilio & consensu magnatum & Re-*
 “ *ipublicæ Communi Sponsione Autho-*
 “ *ritate Regis sive Principis præce-*
 “ *dente justè fuerit definitum & ap-*
 “ *probatum*”; and also by our famous *Magna Charta*, which though it runs

^f 8 *Coke's Princes Case. Hale's History of the Law*, p. 8.

^g *Mabillon de re diplomatica*, 157. *Mezeray* in the Reign of *Philip*. *Madox's History of the Exchequer*, p. 19.

^h *Grotius de R. Bat.* 78.

ⁱ *Dalrymple's Collection concerning the Scotch History*, p. 229, *Et passim in Apendioe*.

^k *Lib. i. c. i.*

in the King's Name, yet has the Assent and Approbation of the Peers testify'd, by the Insertion of their Names under the Clause of *hiis Testibus*^k. This Form of making Acts, after the Defeat of the Earl of *Leicester*, Prerogative running exceeding high, and Liberty languishing, receiv'd an Innovation; and as the Subjects were then first forc'd to petition the King for Justice, so the like Manner of applying for Laws was introduc'd; the Petition and Answer containing the Sense of the King and Parliament; from them was extracted the Acts, perhaps by some Committee appointed for that Purpose by Parliament, and as it seems seal'd, as they us'd to be before this Change, with the Great Seal*; and this Method continu'd 'till the latter End of *Henry* the VIth's time; then they were drawn up in the first Instance in the Form we now see them†: The Clause of *hiis Testibus* however continu'd in all Charters and Writs 'till *Richard* the First's, or King *John*'s Reign, then the *Teste meipso* was introduc'd, at first, and for some time only in Writs, or mandatory Pre-

* *Tyrell's History*, p. 452.

† *Hale's History*, p. 14.

cepts, after in more important Cases; which kind of *Teste* since *Henry VIIIth*'s time has prevail'd in all Cases^l, the Patents for Peerages only excepted^m as I suppose at, most assuredly about the time the Clause of *hiis Testibus* was left out, and that of *Teste meipso* was introduc'd; both here and in *Scotland* † the Stile in the Beginning of Charters was chang'd: For, as before the Proposal seem'd to come from the King, and the Assent of the Peers was testify'd, by the Subsignation of their Names; so after leaving out the Attestation of their Consent, the King gave over using the singular Number, and then comes in the Use of the Plural, *Nos,* &c.* The learned Reader will judge whether the Character of King *John*, and the Times consider'd, this was not an evasive Device, of the same Nature with that of his making Earls, to have those Precepts and Commands of his obey'd, which issu'd by his own sole Will, which without the Concurrence of the Peers were not obligatory, and to which they would not concur.

^l *Madox's Dissertat. to the Formulare, 32.*

^m 1 Instit 7. a. 2 Instit 78.

† *Dalrymple's Collection of the Scotch Hist. p. 187.*

* 2 Institute, p. 2. *Nicholson, Hist. Lib. 179.*

The like Forms were also observ'd in the Feoffments made by the Peers, the Assent of their feudal Tenants being also compris'd under the Clause of *hiis Testibus*; and sometimes also under this Clause the Consent of the Persons, without whose Concurrence the Deed was not valid: These Forms continu'd 'till the Alteration of the Forms of our Acts of Parliament, when they were reduc'd to that of a Tripartite Indenture; and all the Ranks of Persons whose Assent was necessary were made Parties to the Acts: So were all Persons interested; instead of their Assents being testify'd under the Clause of *hiis Testibus*, they were, as at this Day, made Parties to the Deed itself. As to the Number of Names that were inserted under this Clause, by the best Observation I can make, I incline to suppose, at first all were inserted; nor will this seem strange, if it be consider'd, that the feudal Peers were not originally many; afterwards on their Increase probably the Majority; and on their yet becoming more numerous, (suppose) in King *Stephen's* time, tho' the Charter receiv'd its Sanction from the Assent of all, only some ⁿ, as it

* ⁿ *Selden's Titles of Honour*, §80.

seems

seems in the Behalf of the rest *, and no determin'd Number, but ever of the greatest Men in the Kingdom °; perhaps the Names of those who were appointed to put it into Form.

If these Observations are allow'd to prove, that the Mention of these Persons Names under the Clause of *hiis Testibus* imported their Assent; then 'tis clear, that originally all Earls were made by the Assent of the Parliament; and they yet retain in their Patents an Evidence of their being so created still.

4. Many Patents for Peerages were pass'd in Parliament, and undoubtedly were Acts of Parliament; many Creations made out of Parliament were confirm'd in the subsequent, for which there seems to have been no Ground, if the King alone had a Right to confer the Title.

5. The Barons have claim'd, and according to the Opinion of several learned Antiquaries justly too, that all Offices ought to have been fill'd up in

* *Petyt's Rights of the Commons*, 37.

° *Mad. Dissert. to the Formulare*, p. 32.

p *Selden's Titles of Honour*, 624. 8 *Coke's Princes Case*. *W. Jones*, 104. *Pryn's Plea for the House of Peers*, p. 6. *Tyrell's Introduction to the Third Vol.* p. 6, and in the Third Vol. p. 661, 886.

the times we treat of by Consent of Parliament; and during the Period of Time we are speaking of, Earldoms were officary, and consequently within the Barons Claim.

6. It seems clear by the Law, at least, as 'twas understood in the Times now treated of, that all Earls had Counties appropriated to them (though they did often write themselves Earls of some of their Castles)⁹ and that no Power but that of King and Parliament could make a County, or consolidate two into one, seems to have been the Opinion of latter Ages also; for *Henry VIII.* by the Authority of Parliament, divided *Wales* into Shires; and *Hampshire* was after, by Act of Parliament, consolidated with *Northumberland*: It may therefore be infer'd, that, suppose the King could grant a County that escheated, and thereby make an Earl; yet that he could not originally increase their Number: Nor do I recollect any Instance of an Earl's being made without the Title of a County 'till King *James* the First's Reign: Since indeed Dukes and Earls becoming more numerous, many have assum'd

⁹ *Vincent* against *Brook*, p. 11.

other Titles; and some have even taken Titles from Lands that are not immediately held of the Crown, which 'twill be very difficult to reconcile to Law or Reason.

Against the Parliamentary Creation of Peers, besides the present Practice, there arises an Objection from a Record, the Knowledge of which I owe to a very learned Friend: As 'tis not possible to judge of the Weight this Objection ought to be allow'd, but by a Perusal of the whole Record, I shall here insert it at large.

*Objections
against the
Parliamentary
Creation
of Earls
from a
Record.*

“ OUR Soverain Lord, like it your
“ Noble Grace to be remembred
“ howe I *John* Erle Marescall have sued
“ in diverses your Parlementz, in tyme
“ of your gracious Regne, desirying to
“ have Declaracion made for my Place
“ in yis your Hie Court of Parlement
“ aboue my Cousyn of *Warwyk*, as I
“ and all my Auncestres, and Prede-
“ cessours have had at all tymes, of
“ which no Mynde ys ye contrary, as
“ Erles of *Northfolk*, as well for he
“ Blode Riall, and Armes Rially, yat
“ I am come fro, and bere, as for the
“ said Erledome, as by diverses Evi-
“ dences, Wrytinges, and Recordes in
“ yis your present Parlement declared,
“ fully

“ fully in my Conſeit ys proved, which
 “ proves notwithstanding, yat Hie and
 “ Myghti Prince my Lord of *Glouc.*
 “ your Bealuncle, and your oyer Lords,
 “ by your Hie Auctoritie in your Par-
 “ lement aſſembled for diuerſes Cauſes
 “ hem moevyng, will not take upon
 “ hem Declaracion for my ſaide Place,
 “ whereupon the Comunalte of your
 “ Realme at ys tyme by your Com-
 “ maundement callid to yis your Riall
 “ Court of Parlement, ſeyng yis Delay
 “ of which were like to growe uneale
 “ and unfrendly Love betwene me and
 “ my ſaid Couſyn of *Warwyk*, hau
 “ in all humble wiſe, iſtaunced your
 “ innocent and benygne Soveraine Lord-
 “ ſhip, conſyderyng howe yei here ſey
 “ by common Langage, yat I ſhuld
 “ be born to be Duc of *Norffolk*, which
 “ if ſo, were your Comunaltie ſuppo-
 “ ſeth ſhold make finall Concluſion of
 “ ye Determination of my ſayd Place
 “ above my ſaid Couſyn of *Warwyk*,
 “ at the Reverence of which Comu-
 “ nalte, as wel as for ye Deſire yat I
 “ love to have Peas, Reſt and Tran-
 “ quillite with my ſeyde Couſyn of
 “ *Warr.* And in eſpecial, deſiring to
 “ ſave ye Right and Inheritance of me
 “ and my Heires, yat God of his
 “ Grace hath ſuffered me to be borne
 “ unto,

“ unto, cleyme to be Duc of *Norffolke*,
 “ declaring to your Noble Grace, to
 “ yat Hie and Myghti Prince your Beal-
 “ uncle, my Lord of *Glouc.* and to all
 “ ye oyer Lords in your present Par-
 “ lement assembled, howe yat yt liked
 “ to King *Richard* ye Seconde, after
 “ ye Conquest, your worthi Prede-
 “ cessour, for diverses Notables Causes
 “ him moevyng in his Parlement holden
 “ at *Westm.* the xxix. Day of *Septem-*
 “ *bre*, ye Year of his Regne xxi, by
 “ his Letters Patentes to cree *Thomas*
 “ that tyme Erell of *Notyngham*, and
 “ Marescall of *Ingeland*, into Duc of
 “ *Norffolk*, with the Stile, Title, Name
 “ and Worship to ye same Duche ap-
 “ pendant, to have ye said Stile, Title,
 “ Name and Worship to ye said Duc,
 “ and to his Heires Males of his Body
 “ comyng for evermore. And over yat
 “ ye said King, King *Richard* yat same
 “ tyme by his said Letters Pattents
 “ granted to the said Duc, and to his
 “ Heires Males of his Bodie comyng
 “ for the better Sustentacion of the
 “ said Stile, Title, Name and Worship,
 “ xi Marcs yerlie, to be take in his Ex-
 “ chequer, at ye Festes of *Pasque* and
 “ Seint *Michell*. Which *Thomas* Duc
 “ had Issue *Thomas* and Mee; and of
 “ his Stile, Title, Name, Worship, and
 “ Annuel

“ Annuel Rent of xi Marc; the said
 “ *Thomas* Duc dyed seized in tyme of
 “ the said King *Richard*; after whose
 “ Deceffe, the said Stile, Title, Name,
 “ Worship, and Annuel Rent of xi
 “ Marc, descended to the said *Thomas*
 “ the Sonne, as Sonne and Hier, which
 “ *Thomas* the Sonne dyed yereof seized
 “ within Age, and withoute Issue of his
 “ Body comyng, after whose Deceffe,
 “ the said Stile, Title, Name, Worship,
 “ and Annuel Rent of xi Marc de-
 “ scended to me, as Broyer and Heir,
 “ be Force of the said Creacion and
 “ Graunt. And so I clayme to be Duc
 “ of *Norfolke*, and to have the Stile,
 “ Title, Worship, and Annuel Rent of
 “ xi Marc aforesaid: And yat I may
 “ by you our Soverain Lord, my saide
 “ worthy Lord your Bealuncle, and all
 “ your oyer Lords, be so reputed, holde
 “ and declared, in yis your Rial Court,
 “ and to have and enjoie my Place
 “ yerto accordant: Savying alweis, ye
 “ Title, Right, and Possession of Mee,
 “ and myn Heires of myn Body com-
 “ yng, as Erels of *Norfolk*, to my
 “ Place in this Hie Court, above my
 “ saide Cousyn of *Warr.* and his Heires,
 “ bycause ye Name of Duc of *Norfolk*
 “ is tailed to me, and to my Heires
 “ Males

“ Males of my Body comyng. And
 “ the Name of Erel of *Norfolk* is tailed
 “ to me; and to my Heires of my Body
 “ coming generally. Besechyng mekely
 “ unto your Hie and Noble Grace, yat
 “ yis my Supplicacion, and all oyer
 “ Matteres into yis your saide Parle-
 “ ment, by mee and myn Counsel no-
 “ tified, ministred and declared, in proof
 “ of my Place for to be had, as Erell
 “ of *Norff.* above my said Cousyn of
 “ *War.* may be in yis your Parlement
 “ entred, and of Recorde enacte.”

*Q*UA quidem Petitione in Parlia-
 mento predicto lecta, plenius &
 intellecta ac habita, inde cum Justi-
 ciariis, & Servientibus Domini Regis
 ad legem, ac aliis peritis de consilio
 ipsius Domini Regis matura & dili-
 genti deliberatione: Consideratoq; quod
 licet prefatus nuper Rex Richardus,
 in dicto Parlamento suo Thomam,
 nuper Comitem Notinghamiæ, in Du-
 cem Norff. in forma predicta creave-
 rit: Ac idem Parliamentum cum suis
 circumstanciis & dependenciis quibus-
 cumque postmodum in Parlamento Do-
 mini Hen. nuper Regis Angliæ, aut
 Domini Regis nunc, apud Westm. in
 Festo Sanctæ Fidis Virginis, Anno
 N Domini

Regni sui primo, tento, generaliter revocatum extiterit, & penitus adnullatum, pro eo tamen quod hujusmodi creatio Ducum sive Comitum, aut aliarum dignitatum ad solum Regem pertinet, & non ad Parliamentum, prefatusque nuper Dux diu ante dictum Festum Sancte Fidis, diem suum clausit extremum, prout per diversas Inquisitiones post Mortem ejusdem nuper Ducis, virtute quorundam brevium ipsius nuper Regis Henrici captas, & in Cancellaria sua retornatas, ac in presenti Parlamento de advisamento Dominorum Spiritualium & Temporalium predictorum, exhibitas & ostentas, plenius poterit apparere, sicque revocatio dicti Parliamenti ipsius nuper Regis R. prefatum nuper Ducem aut Heredes suos absque speciali mentione de eis facta in eadem, nullatenus ledere potuit: Ac etiam pro eo quod inspecto rotulo ejusdem Parliamenti prefati nuper Regis Henrici, nulla fit mentio in eodem, de aliqua speciali revocatione sine adnullatione Stili, Tituli, Nominis vel Honoris ipsius nuper Ducis, vel dictorum Heredum suorum.

Necnon pro eo quod quamplures alii, quorum quidam in Comites, quidam in alios status sive dignitates per
pre-

prefatum nuper Regem Richardum in
 dicto Parlamento suo, modo consimili,
 creati fuerunt, suis Stilis, Titulis,
 Nominibus, & Honoribus extunc con-
 tinue usi sunt & gavisi, ac eis in pre-
 senti gaudent & utuntur, dicta gene-
 rali revocatione & adnullatione Par-
 liamenti ipsius nuper Regis H. ut pre-
 mittitur facta, non obstante: aliis
 quoque quampluribus notabilibus de
 causis tunc ibidem diligenter attentis,
 tandem per Dominum nostrum Regem,
 de avisamento & assensu Dominorum
 Spiritualium & Temporalium predic-
 torum, ac Communitatis Regni Anglie
 in dicto presenti Parlamento existen-
 tium, necnon Justiciariorum, & Servi-
 entum Domini Regis ad legem, & alio-
 rum peritorum de consilio ejusdem Do-
 mini Regis predictorum, declaratum
 fuit & unanimiter concordatum, quod
 prefatus Johannes Comes Marecallus,
 & Filius predicti Thome Ducis, &
 Frater, & Heres predicti Thome Fi-
 lii Thome, virtute carte, & Succes-
 sionis predictorum de cetero Dux Norff.
 reputetur & teneatur, ac Stilo, Titu-
 lo, Nomine, & Honore Ducis Norff.
 gaudeat & utatur juxta tenorem Car-
 te supradicte. Quam quidem declara-
 tionem & concordiam, prefatus Do-
 minus Cancellarius Auctoritate Regia

postmodum, viz. xiiij die Julij, ultima die hujus Parliamenti, de avisamento Dominorum Spiritualium & Temporalium predictorum in pleno Parlamento predicto, in presentia Domini nostri Regis, publice declaravit. Super quo prefatus Johannes, ut Dux Norff. homagium ligeum eidem Domino nostro Regi tunc ibidem immediate fecit, (quo facto) idem Dominus noster Rex de avisamento & assensu predictis, ipsum Ducem inter pares Parliamenti predicti in loco competentis sedere demandavit; quod idem Dux gratanter fecit tunc ibidem.

Observations on it.

Here seems indeed an express Testimony for the Prerogative, but many Observations must be made before its Weight can be judg'd of.

1. The material Passage is only in the Recital, therefore it cannot be creative of a new Right, but at most, declaratory of an antient one.

2. Such a Recital is not of the same Authority as the Recital in our Acts of Parliament since *Henry VIth*'s Reign; for, as was remark'd on another Occasion, the Acts were not then drawn into Form on the first Instance, but that this was first begun in the latter End of this very King's Reign: So that it seems some Acts not warranted

ranted by the Petition or Answer had been then made, and the Flagrancy of such very soon after introduc'd the Method now in practice: Hence we may well question, suppose this were an Act of Parliament, for it seems only a Judgment given in that High Court, whether these Reasons were the Sense of the Legislature, or only the Flourishes of them who drew up this Record, and the more so, because nothing in the Petition warrants it.

3. This Record seems also to carry a strong Evidence of the Parliamentary Creation of Peers, because 'tis evident, that on this Supposition the Duke had not then the possession of the Title or Rights appertaining to that Rank.

4. If the Power of the King had been clear, what Occasion was there to mention any other Reason, for the Judgment given in Favour of the Claimant.

5. The conferring Earldoms might at the time we speak of be vested in the Legislature, and the Right might by subsequent Usage be gain'd before, or in *Henry VIth*'s time, as it now is by the Crown.

Some Persons have imagin'd, that these Tenants of the dissolv'd Baronies, who were distinguish'd by the Name of the Less Barons, did not enjoy any

*The Lesser
Barons
part of
the Legis-
lature.*

Share in the Legislature, nor the other Rights of Barons; but this is an Error: For there is proof enough, that in all this space of Time, the Notion of a Baron continu'd annex'd to a Tenancy in chief of the Crown; and that these lesser Barons enjoy'd the same Privileges the greater did. *Henry II^d's* Time affords two pregnant proofs of this; for, by the Assize of *Clarendon*, 'tis clear all the Ecclesiastick Tenants in chief were Barons; and by parity of Reason, the like may be concluded of the Lay, on the Feoffment he made of *Berkley Castle*, (which has been before remember'd) he reserv'd only the Service of five Knights. Two of these, by what Means I know not, were extinguish'd; and yet, by an Inquisition taken in *Edward the III^d's* Time 'tis found the Castle was held by Barony by the Service of three^a. The same Notion continu'd in *Edward II^d's* Time, for the Abbot of *Leicester* being summon'd to Parliament excus'd himself, because his Abbey was founded by *Mountford* Earl of *Leicester*, and in consequence thereof was not held in chief of the Crown*. In *Edward III^d's* Time by Inquisition it appears, the Castle

^a *Atwood*, 188.

* *Pryn's* Plea for the House of Peers, 151.

of *Abergaveny*, which even at this Day is held by Barony, was found to be held in chief by a military Service*.

This Increase of Tenants in chief had produc'd a very unequal Representation of the Kingdom, these lesser Barons having an equal Share in the Legislature with the most potent; and this Grievance being now probably grown to the greatest Height, when K. *John* was reduc'd to Reason, this Clause was inserted in his *Magna Charta*.

Preterea volumus & concedimus, quod omnes alie Civites, & Burgi, & Ville, & Barones de quinque portubus, & omnes portus habeant omnes libertates, & omnes liberas consuetudines suas, & ad habendum commune consilium regni de auxiliis assidendis (aliter quam in tribus casibus predictis.) Et de scutagiis assidendis summoneri facimus Archiepiscopos, Episcopos, Abates, Comites, & majores Barones Regni sigillatim, per Literas nostras. Et preterea faciemus summoneri in generali per Vice-Comites & Ballivos nostros, omnes illos qui in capite de nobis tenent ad certum diem sc. ad terminum 40 dierum ad minus, & ad certum locum & tempus, in omnibus literis illius summonitionis, causam

*The Clause
in King
John's
Magna
Charta
concerning
Barons.*

* Treatise of the Barony of *Abergaveny*, 65.

summonitionis illius exponemus : Et sic facta summonitione, negotium ad diem assignatum procedat, secundum consilium eorum qui presentes fuerint, quamvis non omnes submoniti venerint.

The Consequences of
it.

In this Paragraph many Things deserve Consideration. 1. It occasion'd a new Distinction of Barons; for, as the splitting Baronies gave Rise to the Difference of the old and new Feoffment, and that of greater and less, so did this to that of Parliamentary and Unparliamentary Barons; and as the Word was formerly *per Eminentiam*, apply'd to the chief Man of the place; so did it likewise in time become appropriated to the chief Man of those places who sat in Parliament: Hence the Addition of Baron became consider'd as an Honour; and as before, the Title of the Person's Office, Bishop, Earl, &c. was inserted in Deeds, so now began what was more common in K. Henry the Third's Reign, for the Barons to write themselves Barons of their chief Castle^b: And as a great Antiquary observes, then the lesser Barons were stil'd military Tenants; whereas before, all Tenants *in Capite* were in our His-

^b Spelm. Rem. 245.

tories and Records denoted by the common Name of Barons*, and their military Tenants, as it seems by the Certificates of the Barons^c in *Henry* the Second's Time Tenants, by Knights Service. 2. It appears, that the great Barons were to be severally summon'd, so they are at this Day; but this Clause does not declare who were great Barons. All the Light I can find to determine this by is, 1. From the Inquisition, concerning the Tenure of the Castle of *Berkley*, already cited on another Account; by it 'tis plain, that at most five, perhaps three Knights Fees at this time constituted a Baron. 2. If more than one Knight's Fee that was held in chief did not entitle the Tenant to the Appellation of a greater Baron, than the immediate Tenants to the Crown not sitting, but only (as will be clear'd in the Sequel) by Representation, it will follow, that there was then two Degrees of Representations, which is without Example, contrary to Reason and a known Maxim in Law, that an Authority, unless coupled with an Interest is not transferrable; so that it should seem that

* *Selden's Tit'es of Honour*, 589. ^c *Madox's Hist. of the Exchequer*, 400.

those

those were the greater who had any Sub-Tenants, those the less who had none. The learned Reader may, but I do not pretend to decide the Justness of this Conjecture.

*The Origin
of Knights
of the Shire.*

Tho' by Vertue of this Clause that limits the particular Summons to the greater, the lesser Barons were excluded from sitting in Parliament singly, and in Person; yet as it directs, that they shall be summon'd in general (a Term, if the Hypothesis that has been offer'd concerning the Burroughs is true, then well understood) it gave them a Right to do this, as a Community in general, and by Representation; which was most just, for otherwise, tho' before, every Individual had a Right vested in himself, all of them would have been excluded, when all the Land-holders had a Share in the Legislature from any; and this too contrary to the universal practice of the antient Times; whereas, the admitting Persons as their Representatives was in some measure restoring the antient Constitution, because as the Land these Tenants held, when united in one Seignory, intitul'd the Possessor, amongst other Rights, to that of a Voice in Parliament: so was it reasonable, that some in behalf of these lesser Barons should be authoris'd for the Exercise

cise of this Right, which as a collective Body they could not otherwise exercise. As all these lesser Barons were co-ordinate in Rank, this naturally devolv'd on such of their Body as the rest confer'd it on; the Persons so chosen were from the Tenure of their Lands call'd Knights (such is the Law Phrase borrow'd from the old *Saxon*, that signifies Tenants by military Service) and representing the whole Community of the respective Shires for which they serv'd, had that Addition also.

The general Summons for the lesser Barons is by this Clause directed to be in forty Days; and that Term has still continu'd to be the space betwixt the *Tesse* and the Return of the Writ; within that Number of Days there is ever a County Court held, to which none but the immediate Tenants of the Crown (the lesser Barons) came, there was the Election made, and none other had Votes 'till by the 8th of *Henry the Sixth*, *chap. 7.* all Freeholders of *40 s. per Annum* had that Right given them, which is the only Act they who are Tenants to any private Person exercise in that Place; for some time the Number did not seem to be well settled, but 'twas not long e're they were fix'd

to the Number that are now chosen. Whether they had originally any Wages is not clear, for a very diligent Searcher of our Records could find no Writs for levying them older than *Edward I.*^d Besides these Observations that arise from the Act itself, the Writ for the Election of Knights of the Shire suggests one that ought not to be omitted: In it we find these Words, *Duos Milites Gladiis Cinctos*; which though now consider'd as of no Import, did, however, in antient times, contain a Description of the Persons that were capable of being elected: For our *German* Ancestors had a Custom in their own Country (as is noted above) of bringing the Youth into their publick Meetings, and there, by a Ceremony suited to the Simplicity of that Age, admitting them into the Number of military Persons. This they carry'd with them into their Conquests. Long it continu'd in Use here and elsewhere: Our Histories are full of Instances of it, as may be seen in *Selden's Titles of Honours*, and several Usages now common amongst us are thence deriv'd. When Knights Fees became hereditary,

^d *Prynne* on the 4th Institute, p. 2 & 3.

the Persons who had pass'd this Ceremony were call'd *Milites Gladio Cincti*; those who held by military Service, but had not, were stil'd simply *Milites*^e: Hence we see that none but those were capable of being chose; but this Limitation is now taken off *per* 23 *Henry VI. chap. 25.*

As the Civil Wars in *England* did introduce a Departure from the antient Constitution, by the Increase of the Tenants in chief, so the like Causes, though not so soon, seem to have produc'd the like Effect in other Countries; for in *Scotland*, in the Year 1425, an Act pass'd to oblige all the Barons to attend in Person, and not by Proxy, without a lawful Impediment. This Act making the Parliament, it seems, numerous, the same Year one pass'd to excuse the small Barons, provided two came commission'd from the rest: By a subsequent Act 32 Years after, the Denomination of small Barons is determin'd to all under 20*l.* *per Annum*; but even these were obliged to attend, if specially summon'd, and Forty six Years after the Exemption given to those of 20*l.* *per An-*

The Limitation of the Number of Barons in Foreign Countries.

^e *Cambden's Britan.* 246.

num is extended to all under an Hundred Marks, with the like Clause for the Attendance of these, if particularly summon'd. In *Scotland* also, these Commissioners had, by Act, pass'd in the Year 1427, their Charges allow'd them; and thereby 'tis directed, that those Charges shall be levy'd on the Persons, who were by their Appearance excus'd coming: and in the Year 1682, an Act pass'd, declaring the Right of Election, to reside only in the immediate Tenants of the Crown, which is still in Force throughout that part of this Isle, two Counties, I think, only excepted.

In *France* also, the Number of immediate Tenants of the Crown increasing, as it may be conjectur'd from the self-same Occasion that it did here; the Dignity of Peers became annex'd to twelve of the principal Fiefs that held of the Crown, and in other large Baronies in that Kingdom the like was also practis'd^f.

*The Law
of Henry
the III^d.*

As the Barons Success against King *John*, in some measure restor'd the ancient Constitution; so did *Henry III^d*'s Victory over the great and good Earl of *Leicester* introduce a most enormous

^f *Dufresne* in voce Par.

Deviation from it, or at least gave him a Colour for doing so; for 'tis said, that he obtain'd an Act of Parliament to this purpose, *Quod omnes illi Comites & Barones Regni Angliæ, quibus ipse Rex dignatus est brevium summationis dirigere, venirent ad Parliamentum, & non alii nisi forte Dominus Rex alia brevium eis dirigere voluisset.*

Whether this Extravagant Constitution had the Sanction of a Legal Parliament may be justly question'd; or if it had, whether the Donation of the Liberties and Properties of the Nation by those who were intrusted to defend them was not void, as void as an Act of a Trustee contrary to his Trust is: For, as *Tacitus* says, & *Apud Sapientes cassa habebantur quæ neque dari neque accipi salva Republica poterant.* However, the Extent of this monstrous Provision, and its real or supposed Effects shall be briefly touch'd.

1. This Clause did not enable the King to make any new Barons, Observations on it. but only to select whom he pleased out of those who before had all an equal Right to come to Parliament, that is out of the *majores Barones.*

& *Tacitus*, p. 458.

This seems also to have been the Sense of Lord *Coke*, who says, the Writ does not entitle one to the Privilege of a Baron, 'till the Party has once sat in Parliament^b; for the Peers are the only Judges to determine who are capable of being summon'd, as of their Body; and therefore 'till they had allow'd the Person summon'd to be one of the greater Barons, by receiving him into their Number, no Peerage was suppos'd to be gain'd by the Writ.

2. It has been said, that this Clause introduc'd a new Species of Barons, who are commonly call'd Barons by Writ. This Notion was first question'd by the very learned Mr. *Pryn*, and from him borrow'd by others: That learned Author asserts, that these Barons, who are call'd Barons by Writ, were really Barons by Tenure; the following Observations do, I conceive, evince the Truth of his Opinion.

1. The Nature of every Writ being only to command the Person to whom it was directed, to do something he was before under a legal Obligation to perform, it seems a very extravagant thing, to say it was creative of a new Right.

^b *Coke on Littleton*, 166. 12 *Coke*, 70.

2. All the Peerages that are said to be created by the Writs, are agreed to be descendable to the Heir general, which shews, that the Baronies were understood to be annex'd to the Land which is always presum'd to be Fee Simple.

3. However modern Practice may have vary'd, yet in former Times all the Persons who had Writs were immediate Tenants of the Crown, and consequently Barons in the old Sense of the Word: So that the Barony could not, (though the Seat in Parliament might) be gain'd by the Writ.

4. If the Writ could create a Peerage, why might not any of the superior Nobility be so made? yet none ever suspected such a Thing.

5. The calling the Peers eldest Sons to Parliament, by some Barony first in their Fathers (for none were ever call'd to the House of Lords by a Title foreign to their Families) seems to be grounded on the same Reason; for, that Barony is either actually, or at least by Intendment of Law, antecedently by the Father given to the Son: So that in such case the Son being a Baron in the Eye of the Law, was equally capable, as well as any other Baron, of receiving the Writ, and in consequence thereof, becoming a Lord of Parliament.

The Crown, under the specious Pre-
tence of the forecited Provision of *Hen.*
the Third, exercis'd a Power of send-
ing Writs sometimes to some Barons,
at other Times to others, according as
the several Factions or Parties prevail'd;
this is the true Reason of the Variety
that may be observ'd in the Summons
to Parliament : Not as a late Author has
pretended, from many Persons being
summon'd only as Assistants.

*The Origin
of Barons
by Patent.*

This exorbitant Power of the Crown,
as 'twas first exercis'd in Times of the
utmost Confusion, so was it gradually
disus'd, and a Method taken to fix the
Members of the Legislature, in Imitation
of what had long before been practis'd
in the creating Earls, by making Barons,
with a Right to sit in Parliament by
Patent. This Practice was first begun
in *Richard* the Second's Time in the
Person of *John Beauchamp*, Baron of
Kidderminster. Hence the Nature of
these Patents, which have been before
enquir'd into, with respect to the Cre-
ation of Earls, is also considerable in
this place : But as most of what has
been said is equally applicable to the
Barons Patents, I shall only here men-
tion one Argument that the State of
Affairs in this Period of Time affords,
and

and what a late Author has wrote in particular concerning the Barons.

If the Provision of *Henry* the Third is admitted to be an Act of Parliament, as the Writ or Patent of one King cannot divest his Successor of a Right given by Parliament, it must necessarily follow, that either the Patents after that Time were so many Acts of Parliament, or else, that they did not convey an hereditary Right to a Seat in Parliament: One of these Propositions is manifestly true, which let the learned Reader judge.

*Whether
their Pa-
tents were
Acts of
Parlia-
ment.*

A late Author, to prove the Parliamentary Creation of Barons, has insisted on three Acts of Parliament pass'd in *Henry VIIIth*'s Time; his Expressions are confus'd, therefore lest I should any ways injure his Sense, I'll here insert his own Words, " Consistent with
" which Notion of the Law (*viz.* that
" no Power but that of King and Par-
" liament can create a Barony) *Henry*
" *VIII.* who cannot justly be suspected
" of being a Prince willing to diminish
" his Prerogative, did derive his Exer-
" cise of this Power from an Act of
" Parliament; for in 31 *Henry VIII.*
" the King's own Manor of *Hampton-*
" *Court* was by Act of Parliament made

“ an Honour, by which Act, the Ma-
 “ nors of *Byflete* and *Weybridge*, in
 “ *Com. Surr.* and feveral other Manors,
 “ are made part and parcel of that Ho-
 “ nour : So likewise in 33 *Hen. VIII.*
 “ other Acts to the fame purpose pas-
 “ fed in Favour of the Manor of *Ampt-*
 “ *hill* and *Grafton*, by which they
 “ were made Honours. And I believe
 “ that no Instance can be given from
 “ the Conquest unto this Day, of any
 “ Honours being erected otherwise than
 “ in Parliament”.

On this Paragraph the Reader will observe,

1. That the first Act of Parliament was for making *Henry* the VIIIth's own Mannor an Honour ; and unless he had an Intent to part with that, or had a Mind to add the Title of Baron of *Hampton-Court* to that of King of *England*, the Argument proves nothing.

2. By this Author's Manner of writing, it should seem that he had seen these three Acts, and found something in them that gave at least a Colour for his Supposition ; but sure I am, in one of them, which I have seen and perus'd, no such Thing appears, and I am well assur'd nothing does in the other two.

3. One would imagine by this Kind of Reasoning, that *Henry* the VIIIth had

had met with some Difficulty in the advancing Persons he intended to honour, and took this indirect Way of compassing his End; whereas nothing is less true: For he never was on any Occasion obstructed in such Design; many he advanc'd to the Peerage, but not one Person by the Grant of these Honours.

4. Two of these Honours, (*viz. Amptbill and Grafton*) did in Time become the Property of several Subjects, yet did they not assume the Titles of Barons of these Places.

From this Period of Time to the present, (the Exclusion of Abbots and Priors, on the Reformation, only excepted) the legislative Power has been vested as it now is; so we may, I think, safely conclude, that from the earliest Accounts of Time, our Ancestors in *Germany* were a Free People, and had a Right to assent, or dissent to all Laws; that that Right was exercis'd, and preserv'd under the *Saxon* and *Norman* Kings even to our Days: And may an uninterrupted Exercise thereof (for the Right itself can never be extinguish'd) continue 'till Time shall be no more.

F I N I S.

s



I N D E X.



Bergaveny, *how held* p. 183
 Alodium *what, and the Derivation of*
the Word 26
 — *was hereditary* *ibid.*
 — *not originally, and why after va-*
lued *ibid.*

— *why some converted into Feuds* 27
 Alfred, *divided the Kingdom* 68
 — *his Law* 69
 Arbitrary Power *when first claim'd* 46
 Armies *under a Parliamentary Direction* 44

B

Bar, *its Signification* 119
 — *variously sounded and wrote* *ibid.*
 Baron, *who so call'd* 110
 — *Derivation of the Word* 110, 111
 — *don't occur in Feuds* 119
 — *comprised Burgeses* 138
 — *how as to Burgeses the Use of the Word became*
confin'd to few 146
 — *the Successors of the Saxons Wites* 150
 — *how they differ'd* *ib.*
 — *the Foundation of their Right to sit in Parli-*
ament 151
 O 4 — *Tenants*

INDEX.

———— Tenants why they don't contribute to the Wa- ges of Knight of the Shire	ib.
———— the Meaning of the Word in Scotland	156
———— subscribed Acts of the Earls of Holland	167
———— in Scotland their Names subscrib'd to Char- ters	ib.
———— and in England	ib.
———— claim'd the appointing Officers of State	171
———— when the Less had the same Right with the Great	182
———— when divided into Parliamentary and Unparli- amentary	183
———— when that Addition became an Honour	ib.
———— when first used in Deeds	ib.
———— Who the great, and who the less	185
———— the less, when excluded from Parliament	186
———— the Consequences of it	ib.
———— the lesser sent Representatives	187
———— their Number encreas'd in Scotland	188
———— the Small excluded the Parliament of Scot- land	ib.
———— how divided in Scotland	ib.
———— by Writ whether Barons by Tenure	192
———— are suppos'd Fee Simple	193
———— by Writ, where the Barony before in the Fa- ther	ib.
———— when and why first made by Patent	194
———— Patent, whether passed in Parliament	ib.
———— by Writ, what the Gains by sitting in Parli- ment	192
Barony, what	110
———— when many escheated	159
———— when split into small Tenures	ib.
Baronage, what	110
Barons Services, their Origin	35
Barkley Castle, Feoffment of it	182
———— how held	ibid.
Beneficium, the Origin and Sense of the Word	17
Bondmen had some Lands assign'd them	115
Brady his Opinion of the Saxon Legislature	59
Breve Testatum, what	166
———— Baro-	

INDEX.

Bordarij, <i>who</i>	72
Burgess, <i>what, and who the Appellation used for</i>	151
—— <i>sate in Parliament before any Knights of the Shire</i>	152
Burroughs, <i>their Origin</i>	32
—— <i>what</i>	68
—— <i>made by Peers</i>	132
—— <i>originally so many little Commonwealths</i>	138
—— <i>the Derivation of the Word</i>	ibid.
—— <i>the various Acceptation of the Word</i>	139
—— <i>how divided</i>	ibid.
—— <i>originally consisted of Tradesmen</i>	ibid.
—— <i>how they derive a Right to send Members</i>	141
—— <i>what Rights they had within themselves</i>	143
—— <i>have a judicial and legislative Power</i>	ibid.
—— <i>how they made Laws</i>	ibid.
—— <i>why they may prescribe for Customs</i>	144
—— <i>have lost much of their ancient Rights</i>	ib.
—— <i>on the Conquest preserv'd their original Equality</i>	145
—— <i>some held by Grand Serjeanty</i>	147
—— <i>when they sent Members to Parliament</i>	148
—— <i>their Rights compar'd with the Barons</i>	149
—— <i>why they came by Representation</i>	150
—— <i>in Scotland all hold of the Crown</i>	157
—— <i>their Constitution</i>	ib.
—— <i>made Laws</i>	ib.
Burgholder, <i>who, and the Sense of the Word</i>	74
—— <i>elective</i>	75
By-Law, <i>Derivation of the Word</i>	143
—— <i>its Signification</i>	ibid.

C

Caorl, <i>how he might become a Thane</i>	71
—— <i>why so call'd</i>	77
—— <i>how he held his Land</i>	ibid.
Carlisle, <i>the Inhabitants call'd Barons</i>	145
Cæsar, <i>his Character</i>	3
	Celts,

INDEX.

Celts, <i>who so call'd</i>	48
—— <i>their Form of Government</i>	ibid.
Charters, <i>what</i>	166
—— <i>when the plural Number introduc'd in them</i>	170
Champion, <i>who could make one</i>	125
Cinque Ports, <i>the Inhabitants stil'd Barons</i>	145
Civil Law <i>long neglected in Europe</i>	46
—— <i>when it got footing</i>	ibid.
—— <i>Endeavours to establish it here</i>	ibid.
—— <i>forbid in Spain</i>	ibid.
—— <i>prevails generally in Europe</i>	ibid.
—— <i>gave no Title to Arbitrary Power</i>	46, 47
Coinage, <i>a Mark of Sovereignty</i>	132
Colloquium, <i>what it signifies</i>	30
Comes, <i>the Origin and Signification of the Word</i>	24
Commons, <i>Members of the Saxon Legislature</i>	94
Common Pleas, <i>its Origin and Institution, and the Occasion thereof</i>	162
Commissioners of the Shires in Scotland, <i>how chosen</i>	189
—— <i>have Wages, and from whom</i>	ibid.
Confirmation, <i>how it differs from Grants</i>	141
—— <i>why much used in old Times</i>	142
Contract <i>originally implied</i>	37
—— <i>an Express One</i>	38, 39
Copyholders <i>are the Bondmens Successors</i>	116
—— <i>why they don't vote at Elections</i>	ibid.
—— <i>may vote if enfranchised</i>	ibid.
Corfe Castle, <i>its Inhabitants stiled Barons</i>	145
Cottarij, <i>who</i>	72
Counties, <i>their Origin</i>	14, 15
—— <i>how made</i>	172
—— <i>how they might be consolidated</i>	ibid.
County Court, <i>the Cause of its Decline</i>	161
—— <i>who oblig'd to attend at it</i>	187
Court Baron, <i>whom it consisted of</i>	122
Courts in Scotland, <i>their Origin</i>	157
Curia, <i>what it signifies</i>	30
Custom, <i>how it differs from Common Law</i>	143
Customs in Boroughs, <i>their Origin</i>	ibid.
Coronation, <i>when the Oath taken</i>	38, 39
—— <i>once</i>	

INDEX.

— once an <i>Act of Importance</i>	38
— resembled <i>Inveſtitures</i>	ibid.
Cortes, <i>their Origin</i>	15
— <i>Signification of the Word</i>	30

D

Direſtum Dominium of <i>Feuds, in whom</i>	42, 64
Dei Gratia, <i>by whom this Stile firſt uſed</i>	105
— <i>why firſt uſurped</i>	ibid.
— <i>uſed by the Duke of Venice</i>	106
— <i>the Stile of the Archbiſhop of Canterbury</i>	ibid.
Dukes and Dux, <i>the Meaning of the Word</i>	24
Dukedoms, <i>their Origin</i>	14, 15
Durham, <i>how ſtil'd in Records</i>	127
Dyets, <i>their Origin</i>	15
— <i>what</i>	30
— <i>why ſo call'd</i>	ibid.

E

Ealderman, <i>what it ſignifies</i>	21
Earls, <i>in the Saxon Time what</i>	67
— <i>before Alfred</i>	ibid.
— <i>whether they differed from Barons</i>	128,
	129
— <i>how divided</i>	126
— <i>the common Diviſion ill ground'd</i>	ib.
— <i>Palatine, and others, how they differ'd</i>	ib.
— <i>Palatine, their Nature</i>	ib.
— <i>Palatine of the Rhine, his Office</i>	127
— <i>when firſt made without Counties</i>	158
— <i>without Counties degrad'd</i>	160
— <i>how made in King John's Time</i>	161
— <i>how and why their Creation here and in foreign</i>	163
<i>Countries differ</i>	172
— <i>often uſed the Stile of their chief Caſtles</i>	ib.
— <i>when made of Places that were no Counties</i>	ib.
— <i>of</i>	ib.

I N D E X.

_____ of Chester, the Words of his Creation	131
Edward the Confessor polished the Norman Laws	99
English ever a free People	197
_____ and Normans had no Enmity	99

F

Family, how understood in the Saxon Time	71
Faalty, the Forms of doing it	133, 134
Fee, the Meaning of the Word	17
_____ of the old and new Feoffment	159
Feoffments, originally by Word only	165
_____ without Ceremony	ibid.
_____ why first reduc'd to Writing	166
_____ of the Persons and Tenses they are expressed in	165, 166
_____ how attested	166, 167
Franks, how their Kings to decide their Titles	42
_____ would not fight for their Kings Title	ibid.
Feuds, their Characteristick and Origin	16
_____ when the Word first used	17
_____ its Derivation	ib.
_____ when and why made hereditary	31
_____ were esteem'd Gifts	33
Feudal Law, its several Ages	55, 56
_____ its Beginnings	56
_____ what Nation gave rise to it	57
_____ prevail'd amongst the Saxons	ib.
_____ what the antientest System of it	ib.

G

General of the Germans, why vested with the Office	12
Gerefa, what it signifies	19
Germany, what Provinces compris'd under that Name	3
_____ preserv'd its Liberties	ib.
_____ how	

INDEX

———— how divided	ib.
———— had few Kings	ib.
———— had but two absolute Monarchs	ib.
———— great Part of it under Princes	4
———— in it the People determin'd Affairs of Mo- ment	5
———— divided into Cantons	ib.
Germans had general Meetings, and for what	ib.
———— their Custom of giving Arms to their Youth	ib.
———— their Manner of giving Lands	5, 6
———— their Wives and Children did the domestick Busines	6
———— had no common Superior	ib.
———— on a War chose a General	ib.
———— what Power they conferr'd on their General	ib.
———— how they enroll'd their Army	ib.
———— less polite, but more human than the Ro- mans	7
———— compar'd with the Romans	ib.
———— milder Rulers than the Romans	ib.
———— how they treated Slaves	ib.
———— why, and how, they sent Colonies abroad	9
———— chose their General	10
———— found little Resistance in the West of Europe, and why	11
———— settled themselves in Part of the Roman Em- pire	ib.
———— to what their Success is to be attributed	ib.
———— had the Property of their Conquests in them- selves	ib.
———— Armies not paid	12
———— always valued Liberty	ib.
———— how they divided what got by War	12, 13, 14, 16
———— what Governments they establish'd where they conquer'd	18, 19
———— how they treated the Inhabitants of the Coun- tries they conquer'd	25
———— lived	

INDEX.

lived under the same Form of Government	54
establiſh'd the same Form in their Conquests	ib.
how they treated Slaves	27
their General an extraordinary Magistrate	28
why they continued their General in their Conquest	ib.
when their General's Power determin'd	39
their present Governments like what ours was	157
Governments in Europe, consisted of small States	I
the original Obligation of those under one	6
their present State	47
all built on the feudal Law	54
Grave, the Signification of the Word	19
its Etymology	20, 21
Guild, what	72

H

Hamlets, Derivation and Meaning of the Word	69
their Origin	ib.
Henry I. chang'd nothing in the Legislature	158
Henry II. created Earls according to the old Usage	160
made Feoffments of small Fees	ib.
Heptarchy, when dissolv'd	67
Henry VIII. did not create Honors to make Barons by them	196
Henry III. whether his Law concerning the Barons is binding	190
Heretoge, whence derived	29
the Meaning of the Word	ib.
who so styled	ib.
Homage and Fealty, the only Marks of Sovereignty	39
from	

INDEX.

————— <i>from whom due to the King</i>	123
Honours, what ———	
———— <i>how many Mannors originally compos'd one</i>	110
———— <i>in Subjects hands that did not take a Title</i>	
<i>from them</i>	197
Huſting, Derivation of the Word	75

I

Judicature, the Characteriſtick of Sovereignty	15
———— <i>why ſeveral</i>	ib.
Judges, who in the Saxons Time	62
———— <i>originally for Life</i>	154
———— <i>why once more conſiderable</i>	ib.
———— <i>why they amerced Peers</i>	ib.
———— <i>Itinerant when firſt inſtituted</i>	161

K

King, whence the Word in foreign Languages deriv'd	28
———— <i>the Name when firſt uſed in England</i>	29
———— <i>General originally the ſame</i>	30
———— <i>when their Reign is ſaid to commence</i>	38
———— <i>join'd to their Subjects by feudal Tenures</i>	39
———— <i>is not Judge alone of the Title to a Feud</i>	42
———— <i>when they could require the Service of the Peers</i>	ib.
Kings of France, when they could not require their	
<i>Vaſſals to go to the War</i>	43
———— <i>of England, when their Vaſſals bound to attend</i>	
<i>in the War</i>	ib.
———— <i>the Extent of their Power over their Army</i>	45
———— <i>amongſt the Saxons, loſt his Office on a Peace</i>	52
———— <i>amongſt the Saxons, elective</i>	ib. 89
———— <i>Saxon took an Oath</i>	ib.
———— <i>Saxon inferior to the Law and Parliament</i>	189
———— <i>how</i>	

INDEX.

— how originally suable	135
— when first reckon'd a distinct Estate	164
— whether any, and what Power gain'd by the Law of Henry III.	191
Kingdom, what	122
— how it differ'd from other Lordships	ib.
Kings Bench, its Origin	153
— its Jurisdiction	ib.
Knights of the Shire, by whom originally eligible	140
— when first chose	187
— why so call'd	ib.
— where and by whom chose	ib.
— their Number	ib.
— who eligible	ib.
— when they first had Wages	ib.

L

Landholders amongst the Saxons resided upon their Estates	70
— how they divided their Land	71
Laws of England built on the feudal Law	164
Law Books, many have been interpolated	54
Lawyers originally Ecclesiasticks	61
Legislature of the Nations that conquer'd Britain in the People	51
— whence a Right to a Share in it is deriv'd	66
— by what Names distinguish'd amongst the Sax- ons	88
— of the Saxons not only in the King	89
— originally amongst the Germans and Saxons in the Proprietors of Land	ib.
— and so by the feudal Law	90
— of the Saxons met in open Places	91
— became vested in the Magistrates, and why	92,
Legislature amongst the Saxons and Normans alike	93
— and judicial Power when first sever'd	161
Liege-man, who	133
— to Subjects	134
Liberty,	

INDEX.

Liberty, its Consequences, and an Instance of it	8
— occasions an Increase of People	9
—, what Places so call'd	127
Lombards, a People of German Origin	10
London, its many Rights	144
— don't exert all its Privileges	145
— its Inhabitants styled Barons	ib.
Lord, Derivation and Meaning of the Word	71
— Lieutenants, the Time and Occasion of making them	162

M

Magistrates, the Origin and Measure of their Power	36
Mayors, the Notation of the Word	88
Malleum, its Signification	30
Mannor what, and the Derivation of the Word	70
— and Parishes originally coextensive	71
Merchant, how he might become a Thane	73
Military Tenants, the Value of their Fees	106
— were the Militia of the Kingdom	108
— establish'd by William I.	112
— all the Tenants in Chief, but one, were so	ib.
— the Extent of their Duty	ib.
Military Tenures, when first establish'd here	114
— the Number of Tenants that held by it	ib.
— when abolish'd	115
— the various Senses of the Word	136, 184
— of how many Kinds at the Conquest	136

N

Nobility, their Rise	32
Nobilis & Nobilitas, whom these Words signify	88
Norman Barons not oblig'd to attend in foreign Wars	42, 102
— introduc'd the Use of Seals	99
— Laws how made	101

P

Norman

INDEX.

Normans, <i>how they differ'd from the Saxons in their manner of Settling here</i>	109
— <i>how they distributed their Lands in England</i>	115
Normandy, <i>whence so call'd</i>	191
— <i>how divided</i>	ib.

P

Palatinate, <i>the Derivation and Notation of the Word</i>	128
Paltz-Grave, <i>the Sense of the Word</i>	127
Parliaments, <i>their Origin</i>	15
— <i>how denominat'd abroad</i>	30
— <i>of what Persons it consisted</i>	122, 147
— <i>in the Norman and Saxon Times how differ'd</i>	150
— <i>in it every Spot of Ground represented</i>	152
— <i>all the Members sate together</i>	ib.
— <i>why the supreme Court of Judicature</i>	153
— <i>why Writs of Error lye to it</i>	ib.
Parliament in Scotland, <i>the King's Court-Baron</i>	157
— <i>and Convention of the Estates synonymous</i>	149
— <i>of whom it consisted</i>	147
— <i>Difference between the Normans and the Saxons</i>	150
— <i>had the Representatives of every Spot of Ground</i>	152
— <i>sate originally in one House</i>	ib.
Patents for Peerages <i>passed in Parliament</i>	171
Peers, <i>of whom they originally held</i>	39
— <i>their Origin</i>	ib.
— <i>when bound to military Service</i>	42
— <i>if dubious, determinable in Parliament</i>	44
— <i>for neglecting their Duty, punishable only in Parliament</i>	ib.
— <i>in England of whom they held</i>	129
— <i>in Normandy of whom they held</i>	130
— <i>never judg'd by the King alone</i>	ib.
— <i>how</i>	

I N D E X.

— how styled in Law	ib.
— were Sovereigns over their own Vassals	131
— how styled by old Writers	ib.
— the Powers they exercised	ib.
— made Subinfeudations	132, 133
— Vassals only responsible in his Court	131
— Vassals not bound to be Security for the King	132
— coin'd their own Money	ib.
— their Vassals neither did Homage nor Fealty to the King	133
— how they did it to them	ib.
— had submilitary Tenants	138
— of Scotland were Princes	156
— how made by the feudal Law	164
— their Assent necessary in Feoffments	166
— how testify'd	ib.
Placitum, its Meaning	30
Politicks, its End	153
Prescription, what no Ground for one	96
Princes, its classical Meaning	4
— its Signification amongst the middle-ag'd Writers	22
Princes in Germany, elective	4
— their Authority	5
— when chosen	ib.
— were Judges	ib.
— assign'd Lands to the People	ib.
— amongst the Saxons administer Justice	52
Privy Counsellor's Office for Life	154
— in Scotland its Origin	157
— its Origin	153
Principalities, their Origin	14
Primarij	} the Meaning of the Words 88
Primates	
Proceres	
Prior of Christ Church Canterbury, a Baron	124
— by what Service he held	ib.

INDEX.

R

Real, <i>the Meaning of the Word</i>	134
Recitals, <i>what they evidence</i>	180
— create no new Right	ib.
— in Statutes of greater Authority now than formerly, and why	ib.
Relief, <i>to whom due</i>	138
Reve, <i>Origin of the Word</i>	20
Representation <i>cannot be two Degrees of it</i>	185
Rollo, <i>of whom his Army compos'd</i>	101
— was a Dane	ib.
— the Origin of his Power	ib.
— conquer'd Neustria	ib.
— how his Conquests divided	ib.
— when his legitimate Line failed	ib.

S

Sapientes, <i>whom this Word denotes</i>	61, 62
Saxons <i>subverted the British Government</i>	49
— not such Savages as has been represented	ib.
— laterly comparable to any Nation	ib.
— their Origin	50
— not mention'd by Tacitus	ib.
— in Time became considerable	ib.
— gave Laws to Half Germany	ib.
— did not come alone into Britain	ib.
— when they came were Pagans	ib.
— when they had the Use of Letters	ib.
— they and their Confederates that came here were independent People	51
— in Laws and Government agreed with the other German Nations	51, 52
— Delineation of their Government	52
— govern'd by twelve Princes	ib.
— on a War chose a King	ib.
— Government in Germany when changed	ib.
— none of their Monuments older than Christianity	53
— what	

INDEX.

— <i>what the Government they establish'd here resembled</i>	54
— <i>their first Magistrates here</i>	74
— <i>the Ranks amongst them</i>	75
Seignior, <i>to whom the Name applicable</i>	110
Seigniories, <i>when and why made hereditary</i>	109
— <i>what conferr'd on Normans</i>	ibid.
— <i>what they consisted of</i>	122
Senior, <i>the Meaning of the Word in the middle-ag'd Writers</i>	23
Serjeanties <i>divided</i>	112
— <i>Grand and Petit, their Difference</i>	113
Services, <i>whether originally, or when first annex'd to Feuds</i>	18
— <i>what reasonable</i>	33
— <i>of Feuds, what it comes in lieu of</i>	42
— <i>to whom due</i>	ibid.
— <i>not due for the private Good of the Lord</i>	ibid.
Sire <i>is only a Contraction of Seignior</i>	110
Sheriffs Turn, <i>who oblig'd to attend it</i>	71
Slavery <i>contrary to human Nature</i>	95
Sortes Gothicæ, <i>what</i>	26
Statutes <i>originally first assented to by the King</i>	167
— <i>drawn from Petition and Answer</i>	168
— <i>seal'd with the Great Seal</i>	ibid.
— <i>when and why in the first Instance put into Form</i>	ibid.
Summons to Parliament, <i>the Space betwixt the Teste and Return</i>	187
— <i>why not always to the same Person</i>	194

T

Tenants in chief, <i>when they multiplied</i>	160
— <i>had a Right to be judged in Parliament</i>	ibid.
Tenures, <i>their Origin</i>	32
— <i>of various Kinds now</i>	ibid.
— <i>Terra Salica, what</i>	26
Testes of Charters and Writs, <i>how</i>	168
Thane, <i>no Member of the Saxon Legislature</i>	65,
	66, 92

I N D E X

Derivation of the Word	76
how render'd in Latin	ibid.
after call'd Tenants by Serjeanty	ibid.
their Origin	77
Title to a Gift to be determin'd by the Giver	42
Trial by Battle, its Foundation	97, 98
Tytil, his Opinion of the Saxon Legislature	65
his Character	ibid.
Trything, what	68
originally unequal	70
the Foundation of their Division	ibid.
coalesced into little States	74
how they differ'd from Shires	ibid.
had Magistrates	ibid.
the Names of their Magistrates	ibid.
held Pleas within themselves	75
their Jurisdiction original	ibid.
the trading ones paid a Fee Farm	112
left by the Conqueror in the Condition he found them	111

V

Vassal, its Derivation and Signification	25
Vavassor, to whom his Relief is due	134

W

War, the Foundation of it	97
what 'tis	98
when it may be undertook	ibid.
in all one Party in the Wrong	ibid.
when any Right acquired by it	ibid.
what Right can be acquir'd by it	ibid.
what good Cause of waging one	ibid.
Wapentake, what	68
Warren Earls, of his Defence in Quo Warranto	I 4
Warwick, its Inhabitants styled Barons	146

William

INDEX.

William the Conqueror had no Title to despotick Power	96
—— how his Power is to be determin'd	ibid.
—— how the Question concerning it is to be stated	ibid.
—— a Conqueror of Harold, not the English	100
—— had no Quarrel with the English Nation	ibid.
—— offer'd Harold single Combat	ibid.
—— claim'd the Crown by Title	ibid.
—— his Title not good	ibid.
—— could have no more Power than the Person he claim'd under had	ibid.
—— had not despotick Power over his Army	ibid.
—— how he became Duke of Normandy	102
—— his Subjects so by Tenure	ibid.
—— how his Army was compos'd	102
—— how he got Assistance for his Invasion	102
—— and his Confederates Partners	103
—— his Army not under Pay	ibid.
—— refus'd Assistance by some Normans, and why	ibid.
—— did not rule by a military Power	106
—— had the immediate Command of very few military Tenants	107
—— less absolute in the Field than the Palace	108
—— took the Crown Lands to himself	109
—— dispossest'd those that oppos'd him	ibid.
—— what Lands he gave his Confederates	ibid.
—— why they were disjoin'd	ibid.
—— aim'd at consolidating the two Nations	114
—— introduc'd Wardships and Marriages	ibid.
—— how he distributed his Demesne	ibid.
—— how many Kinds of Tenants in Chief he had	ibid.
—— of what Ranks his Army was compos'd	137
—— the Second chang'd nothing in the Legislature	158
Witena Gemot, Dr. Brady's Opinion of it	60

—— the

INDEX.

_____ the Meaning of the Word.	62
_____ gave rise to an Expression now in use	93
Wita, the Meaning of the Word	62
Writs, their Nature	193
_____ never suppos'd to make any Noblemen, but Barons	ibid.

Yeldest Burghwar, *what*



F I N I S.

ERRATA.

PAg. 10. to the Reference at the Bottom add *Jo. Mag. Historic. Got. 317. p. 19. l. 8.* after Understanding add *of. p. 39. l. 24.* dele the fourth Word. *p. 62 l. 15.* for *Destribution* *r. Desolution.* *p. 63.* at the End of the 12th Line there should be a Note of Reference, and at the Bottom of the Page there should be inserted *Vide etiam Hick. Dissert. Epist. p. 5, 59 p. 69.* after the References inserted with the Letter F, add *Vide Brady's Preface to his Treatise of Boroughs, p. 2. p. 128. l. 23.* for *instituted, r. entitled. p. 133. l. 14.* for *King, r. Kings. p. 138. l. 24.* after the Word *Borough* there should be a Reference, and at the Bottom of the Page add *Paulus Diaconus, l. 12. p. 356. Brady, &c.*

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